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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TREVELL AVERHART, Defendant and Appellant.	D073641 (Super. Ct. No. SCN378486)

APPEAL from a judgment of the Superior Court of San Diego County, David G. Brown, Judge. Affirmed and remanded for resentencing.

Cynthia Grimm, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Allison V. Acosta, Deputy Attorneys General for Plaintiff and Respondent.

Trevell Averhart used a BB gun resembling a pistol to rob three people—first a man and then a married couple—as they parked their cars near an apartment complex. A

jury convicted Averhart of three counts of robbery, and the trial court sentenced him to state prison for 20 years. On appeal, Averhart contends the trial court erred in its responses to two questions from jurors and that DNA evidence was erroneously admitted at trial. He also raises claims of instructional error, prosecutorial misconduct, ineffective assistance of counsel, and cumulative error. In supplemental briefing, Averhart contends he is entitled to remand for resentencing to allow the trial court to exercise its new discretion to determine whether to strike two five-year enhancements imposed under Penal Code sections 667, subdivision (a)(1) and 1385, as amended, effective January 1, 2019.[1]

Averhart is entitled to resentencing to allow the trial court to exercise its discretion to determine whether to strike the enhancements. However, we conclude Averhart's other claims lack merit. We therefore vacate Averhart's sentence and remand the matter for resentencing. In all other respects, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Charges*

The San Diego County District Attorney filed an information charging Averhart with three counts of robbery (§ 211) and alleged that he previously suffered two prior serious felony convictions (§§ 667, subd. (a)(1), 668, and 1192.7, subd. (c)) and three prior strike convictions (§§ 667, subds. (b)-(i), 668, and 1170.12).

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1 Unless otherwise specified, further statutory citations are to the Penal Code.

B. *Trial Testimony*

1. *Thomas T.*

On October 1, at approximately 9:30 p.m., Thomas T. and his pregnant wife, Maria T., returned to their apartment building from grocery shopping. As they drove looking for a parking spot, Thomas noticed an African-American male and a Hispanic male in a dirt area off the side of the street where cars park. Thomas parked on the street near a neighboring apartment complex. He exited the car to unload his groceries, but heard two male voices, screaming. Thomas ran back to his car, but before he could leave, there was a man at his window with a gun pointed at his face. Thomas described the gun as a black pistol with two green dots on it. He described the gunman as an African-American male, who was "pretty big," about six foot one, and at least 250 pounds. He was wearing black shorts and a white T-shirt. Thomas identified Averhart in court as the gunman.

Averhart opened Thomas's car door, pointed the gun at his head, and said, "Wallet." Fearing for his life, Thomas gave him his wallet. Maria pleaded with Averhart not to do this, that she was pregnant. Averhart pointed the gun at her belly and said, "Purse, bitch." She gave him her purse, and Averhart took off running with the gun, wallet, and purse. Thomas called 911.[2] Thomas and Maria gave statements to the

2 A recording of the 911 call was played for the jury.

sheriff's deputy who arrived on the scene.[3] Thomas told the deputy that he observed a man getting assaulted as they were driving looking for a parking spot. In court, Thomas explained that he did not actually observe an assault, but he told the deputy he had observed an assault because, after he got robbed, he assumed that was what had happened.[4]

Later that evening, Thomas returned to the scene after deputies called him to inform him they caught the robber.[5] When Thomas arrived, he saw Averhart in handcuffs surrounded by deputies. Thomas remembered Averhart's face and his shorts and identified him as the robber.

Deputies informed Thomas that Averhart did not have his wallet or Maria's purse when he was apprehended. Thomas believed Averhart must have tossed the items nearby, so the next morning, he and Maria searched the area for their property.[6] They eventually found the wallet and the purse, along with a gun, in a hedge near a street sign

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3 In statements to the 911 operator and police, Thomas did not describe the robber as having facial hair; however, when he was arrested, Averhart was described as having a full beard and mustache.

4 On cross-examination, defense counsel asked, "So is it your testimony that although you told the officer that you observed an assault, you did not actually observe an assault?" Thomas answered, "Yes, ma'am."

5 On cross-examination, Thomas testified that he was picked up and driven to do the identification by the deputy who took his statement. Maria testified that she stayed in her bedroom in her apartment while an officer took Thomas to do an identification, then the officer returned with Thomas and took her to do an identification.

6 Thomas testified they searched for four hours. Maria testified they searched for about 40 minutes.

along the next street. Nearby there was a broken pair of glasses, which looked like the ones he had seen on Averhart's face during the incident (except the ones on Averhart were not broken). They called the police, who came and retrieved the gun and photographed their belongings. Thomas's $230 cash was still inside his wallet when he retrieved it.

2. *Maria T.*

As Maria and Thomas returned from grocery shopping and looked for a parking spot, she observed two men in a fight. One man, a heavyset African-American, was grabbing a Mexican man wearing a hat. They were struggling. Maria heard them both screaming, with one person speaking in Spanish and the other in English. Thomas parked and began to exit the car. Maria told him they should leave, and Thomas agreed and got back in the car, but then Maria saw the African-American man running toward them. The man banged on the driver's window with a gun, and Thomas opened the door. The man pointed a gun at her husband's head and her husband gave him his wallet. Maria told the man, "Please don't do this. I'm pregnant." Averhart responded, "You're good, bitch," pointed the gun at her stomach, and asked for her purse, which she gave him. Then he ran away. As he ran away, Maria noticed he was wearing red tennis shoes. Thomas called the police. Sheriff's deputies arrived and separated Maria and Thomas for questioning. After 30 minutes to an hour of talking to the deputies, they went home. About an hour later, a deputy brought Maria back to the scene, where she identified Averhart as the robber.

Maria testified the robber was about five foot six and weighed around 250 pounds. He had black, relatively short, hair in a "regular" cut. He was wearing a white T-shirt and black shorts. Maria could see him clearly during the robbery because the light shone on his face when the car door was opened. Maria identified Averhart as the robber in court.

The morning after the incident, Thomas and Maria searched for their belongings. They suspected they were still in the area because Averhart did not have the items when he was apprehended. After searching about 40 minutes, they found Maria's purse. On the ground nearby they saw a gun. They called the police to retrieve the gun. They did not want to touch the gun; they wanted to preserve the evidence. However, they collected the wallet and purse.

3. *Mauro P.*

Mauro P. testified through a Spanish interpreter, explaining that he did not speak English and understood "very little[;] [a]lmost nothing" of the language. He testified that he returned home around 9:30 the night of the incident and was unable to find parking in his apartment complex. He found a spot on the street nearby. As he exited the car, a man approached him asking if he had found parking, and then grabbed him by the neck and put a gun to his chest. They struggled and fell into the seat of Mauro's car. As they struggled, Mauro pulled off the robber's outer T-shirt, which was blue. The robber pulled a chain from Mauro's neck. In the struggle, the robber dropped the chain and the gun, but then picked them up and ran away with them. Mauro ran towards home; his family called the police. Deputies promptly arrived at the scene. Mauro gave officers the

robber's T-shirt. As Mauro was speaking with a Spanish-speaking deputy, he saw Averhart walking nearby and he told officers that Averhart was the robber.

Mauro described the robber as a Black man wearing a green or blue T-shirt which he turned over to the deputies, dark blue or black shorts, and red and white shoes. Mauro testified that, although it was nighttime, he was able to see the robber as there was light coming from a nearby house, a streetlamp, and from the interior light of his vehicle.

Mauro identified Averhart as the robber in court. He testified he had seen him once before in the apartment complex but did not know him.

On cross-examination, defense counsel asked Mauro if, in his statement to sheriff's deputies that night, he "told the officer that the suspect demanded [his] wallet." The following exchange took place:

> "A: He did. He wanted me to give him everything. But he never pulled it out.
>
> "Q: Did you tell the officer that as the suspect approached you with the handgun, that the suspect demanded your wallet specifically?
>
> "A: He said 'everything,' to give him everything. That's what he said. [¶] I had about four to five . . . rings on my fingers.
>
> "Q: So it's your testimony that the suspect in fact was asking for everything, your jewelry?
>
> "A: Yes, the wallet and everything else. He said to give him everything."

Mauro also told deputies that he feared that if he did not fight the suspect, the suspect would shoot him. Mauro denied telling investigators for the defense that he had previously spoken to Thomas.

4. *Deputy Schaefer*

Around 9:40 p.m., Sheriff Deputy Schaefer and his partner responded to a dispatch call directing them to an apartment complex.[7] Deputy Schaefer initially contacted the two victims. He took a statement from Thomas, who was frightened, shaky, and nervous. Next he took a statement from Maria, who was emotional, crying, frightened, and nervous. Then he and his partner, Deputy Ramirez, responded to a radio call of a third victim in the area. His partner, who spoke Spanish, contacted Mauro, who seemed frightened yet excited.

Averhart appeared at the scene during the sheriff's contact with Mauro, before Thomas or Maria were taken there to do the identification. Averhart indicated that he was going to his vehicle. Mauro approached the defendant, "pointed his finger at him and he shook his head up and down." Thomas unexpectedly arrived at the scene in a vehicle that was not a patrol vehicle around 10:44 p.m. to identify the suspect. Upon arrival, Thomas stated he was 100 percent certain Averhart was the robber. Maria arrived later and identified the defendant. After that point, the defendant was arrested.

Deputy Schaefer collected a blue shirt near Mauro's car. As he photographed the shirt, he noticed two different footprints in the dirt next to Mauro's driver's side door. After Averhart was arrested, deputies collected his shoes. Sheriff's deputies searched for the handgun that night but were unable to locate it. Deputy Schaefer's report of the incident listed Averhart as six feet tall, 315 pounds, with a full beard and mustache.

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[7] Eleven different patrol units, including two K-9 units and a helicopter, responded to the dispatch call, which reported an alleged armed robbery.

5. *Deputy Ramirez*

Deputy Ramirez and his partner responded to a dispatch call regarding an armed robbery near an apartment complex. Initially, he worked to establish a perimeter. He directed three responding units to close off the avenues of escape and "keep everything contained." The eight other responding units were tasked with searching the area. The helicopter used a heat monitor to detect people walking around in the area.

Deputy Ramirez took a statement from Mauro in Spanish. Mauro said Averhart approached him with a gun after he parked his car. Averhart attempted to push Mauro into his vehicle, but Mauro fought back. Averhart ripped off Mauro's necklace. As Averhart fell, he dropped the necklace and the gun. Averhart grabbed the items and took off running.

Mauro told Deputy Ramirez that his attacker was about five foot eleven, over 250 pounds, wearing two shirts—one blue and one light gray—and black shorts. Deputy Ramirez described Mauro's demeanor as "shooken [sic] up, scared, kind of also amped up, like he had just been in a fight."

As Deputy Ramirez was talking to Mauro, Averhart walked up. When Mauro saw Averhart, he stopped talking, walked past the deputies until he was two feet from Averhart, and pointed a finger at him, saying something like, "I got you" or "this is him." Mauro told Deputy Ramirez he was 80 percent sure that Averhart was the robber, and that he recognized the shorts, shirt, and body mass, but he could not remember his face. After that, the police detained Averhart and told him he was a suspect and they "were trying to determine what's going on and if he had anything to do with it."

6. *Deputy Morgan*

Deputy Morgan received a dispatch call sending him and his training officer to the apartment complex around noon the day after the incident. He contacted Thomas and Maria who told him they found the property stolen from them the previous night, along with a gun used to rob them. When he observed the gun, he believed it was an "actual handgun." His training officer picked it up with gloved hands and attempted to clear the chamber. Deputy Morgan observed that he was unable to move the chamber back and realized the gun was a BB gun. Deputy Morgan impounded the gun into evidence. When he obtained the BB gun, he intended to have it evaluated scientifically.

Deputy Morgan observed glasses on the ground near the gun but did not impound them because Thomas and Maria said they did not recognize them, so Morgan did not believe they were relevant. Morgan did not attempt to obtain fingerprints from the wallet and purse, explaining: "Usually when victims touch their property or anything after—or take control of their property, we don't check for fingerprints or anything like that . . . because they have . . . put their fingerprints all over it and ruined [its] evidentiary value."

7. *Detective Orsini*

Detective Orsini obtained a DNA sample from Averhart by swabbing inside his mouth and cheek with two test swabs and impounded them into evidence. He requested two items, the blue shirt and the replica firearm that was recovered the following day, to be tested and cross-referenced with the DNA sample he obtained. The glasses found near the gun were not impounded and not tested.

8. *Criminalist Chang*

K. Chang, a criminalist with the sheriff's crime lab, analyzed DNA samples obtained from the shirt and gun in evidence and compared them to the oral swab reference sample obtained from Averhart. She did not test samples taken from glasses; nor did she compare the DNA identified to reference samples from any other individuals.

DNA obtained from the inner collar of the blue T-shirt reflected at least three individuals contributing DNA. Chang calculated that it was six times 10 to the 29 (6.0×10^{29}), or 600 octillion, times more likely the DNA originated from Averhart and two unknown individuals than it originated from three unknown individuals.

Chang also tested a sample identified as a swab kit from the gun. DNA obtained from that sample reflected three contributors, with one individual contributing 71 percent, a second contributing 18 percent, and the third contributing 11 percent. Chang calculated it was 1.8 times 10 to the 18 (1.8×10^{18}) more likely the DNA originated from Averhart—contributing 71 percent—and two unknown individuals than it originated from three unknown individuals.

9. *Averhart's Defense*

a. *Deputy Balinger*

Averhart called Deputy Balinger as a witness. Deputy Balinger was a canine handler with the sheriff's department. He responded to reports of a robbery with his dog, Edo, who was probably the best dog they had for tracking in the sheriff's department. He contacted Mauro, who was there with a family member who helped translate. Mauro gave him the blue T-shirt and indicated the suspect had headed north. Edo attempted to

track a suspect but did not locate a suspect for the case and did not lead the deputy to any evidence.

b. *Investigator Nunez*

Nunez, a supervising investigator with the San Diego County Public Defender Office, testified that he had previously interviewed Mauro in Spanish. Mauro told Nunez that, right after the incident, someone approached Mauro and told him he had seen the struggle between Mauro and the other individual and that he, too, had been robbed, and a gun was pointed at his head. Mauro also told Nunez he had later seen the same individual during court proceedings, and the individual had mentioned that he found some of the items that were taken from him and his wife the day after the incident.

c. *Averhart*

Averhart testified in his own defense. At the time of the incident, he worked as a security guard and he had been staying at his girlfriend's apartment, which was right next door to Mauro's apartment. He had previously been convicted of two felonies, and, as a convicted felon, was not allowed to be in possession of firearms.

Averhart smoked and dealt marijuana and because of this, he knew Mauro: "He is my neighbor. He stays right next to me and also sells me marijuana from time to time." Averhart did not know Mauro's name but called him "Gumpa," which he thought was "like a Mexican thug, I guess," or "friend, buddy."[8] He first met Mauro near the steps in

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8 Averhart did not know how to spell the word he was referring to; "gumpa" was a phonetic spelling by the court reporter. It appears Averhart was saying "compa," although he did properly understand the word's meaning.

the apartment complex; Mauro said, "Mota, mota," which Averhart said means "weed" in Spanish. Mauro said, "My friend, my friend, I can get, I can get." Averhart told Mauro, "All right. I'm going to hit you up." Averhart subsequently purchased marijuana from Mauro on two occasions. He purchased one pound each time so he could resell it.

On the night of the incident, Averhart saw Mauro in the apartment complex parking lot. They were both in their cars. Mauro said, "I got two, I got two." Averhart testified he asked, "Same price? He said yeah. I said: Same quality? He's like: Yeah, yeah. I got two. I got two. I'm like: All right." Averhart understood this to mean that Mauro had two pounds of marijuana for sale and it was similar quality to what he had purchased before.

Averhart followed Mauro to the street, where Mauro parked. Averhart parked farther up and walked back toward Mauro with money he had in his car, wrapped in a blue shirt. Averhart always kept money hidden in dirty laundry because people stayed away from dirty laundry. Mauro brought a bag from his vehicle. Averhart opened the bag and saw two packages about the size of a tissue box. Mauro cut into the packages and Averhart "grabb[ed] the weed up." Averhart told Mauro, "This ain't it, [compa]," which meant it was not the quality of weed Mauro had given him before. Averhart gave the marijuana back to Mauro and asked for his money back. Mauro said, "No, no," and brought out another two packages from his vehicle. Averhart suspected the packages contained crystal meth and cocaine, and told Mauro, "I can't do nothing with that." Mauro opened the bag of powder and snuffed it up his nose and said, "Look, look, look. It's good." Averhart told him he didn't have the clientele for it. Mauro got a little

upset and put the packages away. Then Mauro reached into his car and pulled out a .9 millimeter gun and said, "No refunds, my friend." Averhart put his hands up. Mauro started pushing Averhart backward toward the street, but then a car came by, and Mauro pulled, but he pulled at the blue shirt, which was over Averhart's shoulder, and stumbled back a little. Averhart "[went] for him," pushing him into his car, struggling for the gun. Mauro dropped the gun; Averhart picked it up, and Mauro ran off. Averhart yelled, "Give me back my money," and attempted to fire the gun toward Mauro, but it did not discharge. Averhart "racked" the gun to load it and aimed again, but Mauro was too far away for Averhart, who is nearsighted, to see clearly, so he did not fire again.

Averhart realized he was standing near an occupied vehicle. Averhart asked the driver, "You with him?" The driver said, "no" and Averhart told him, "keep it moving." The car drove off.

Averhart "black[ed] out and black[ed] in," before running to his car. Averhart "really want[ed] to take off" but headlights from another vehicle prompted him to exit his vehicle. He brought the gun and ran in the direction Mauro went because Mauro still had his money. Averhart ended up back at his apartment, but he did not have a key so he could not enter. He waited at the pool area. He had not yet seen "cops" but "the ghetto bird," i.e., a helicopter, was in the air indicating the presence of law enforcement. There was a loud speaker from the helicopter giving a description of the person they were looking for.

Averhart thought this was a good time to go to his car to "get away from the situation, 'cause he can't do nothing to me as long as the cops are around." After the

helicopter flew overhead, Averhart threw the gun into a nearby trashcan. Then he exited the apartment complex and walked back toward where his car was parked, until he was stopped by police. One of the police officers came over and said "Hey, I just want to detain you for a minute" and Averhart complied. Averhart described his conversation with the officer who approached him: "I kind of asked him what this is about. He said: Well, you—well, you fit the description. I said: Fit the description of what? He said—I said of what? A Black male? He kind of laughs it off." Then, Mauro approached Averhart and looked him up and down; after that, Averhart remained detained by the police. Averhart had never seen Thomas or Maria before they came to identify him as he was detained by police at the side of the road.

After he was arrested, Averhart's car remained parked on the street, unlocked. Two of his BB guns were in a backpack on the front seat of his car. One of his BB guns looked identical to the one recovered near the scene, with two green dots on it. He testified "you can't really tell" from a photograph whether the BB gun found at the scene was his, and later said "yes, that's—that could be it." He had also left his prescription glasses in his unlocked car. Averhart did not know whether the glasses found with the stolen items were his; they were similar in shape and color but his were not broken. Averhart's counsel asked if he had "any idea how your [BB] gun and your glasses got to" the street where the stolen items were recovered, and whether he had "any idea how Thomas's wallet and Maria's purse" got there. Averhart said "not entirely," and "no" in response to these questions.

Averhart did not report the incident to police because he did not trust them, and he did not feel he could tell them that he was in the middle of a drug deal with a guy and took a gun from him.

C. *Conviction and Sentencing*

The jury found Averhart guilty on all three counts of robbery. The trial court found the allegations true, dismissed two of Averhart's prior strikes, and imposed a total determinate sentence of 20 years, comprised of six years on count 1, two years each on counts 2 and 3 (§§ 213, subd. (a)(2), 667, subd. (b)-(i)), plus an additional five-year term for each of the two felony prior convictions (§ 667, subd. (a)(1)).

DISCUSSION

I

Response to Juror Questions During Trial

Averhart contends the trial court's response to two jury questions—which were asked before deliberations began—constitutes structural error, violates his constitutional rights, and requires reversal. We reject Averhart's claim of error.

A. *Additional Factual Background*

Before the prosecutor made an opening statement, the trial court provided a pretrial instruction listing elements of a robbery. The court further instructed:

> "The defendant's intent to take the property must have been formed before or during the time he used force or fear. If the defendant did not form this required intent until after using the force or fear, then he did not commit robbery. [¶] . . . [T]his is what—an example of what I anticipate the instruction will be as to all three charges, obviously, inserting the three different defendants [sic]. But you are to be bound only by the instructions in their final form."

A juror then asked, "I didn't understand the last one. The defendant must have formed the intent of this before they did the act or else—would you explain that?" The trial court responded, "I'm not going to explain it now, but we'll certainly explain it at the conclusion of the particular case."

After the parties rested and before closing arguments, the trial court instructed the jury with CALCRIM No. 1600, Robbery (§ 211). The trial court further instructed the jury, "Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings." (See CALCRIM No. 200.)

Prior to a court recess in the middle of closing arguments, a separate juror asked the court, "Do I have the right to ask you for clarification of a legal term? Because it's been bothering me to know exactly what a legal term—." The following exchange took place:

> "The Court: No, sir. You are limited to the 24 pages of law that you have in front of you.
>
> "[Juror]: Okay. So I can't ask definition to you?
>
> "The Court: Well, let me put it this way. You will see in your packet that—words not specifically defined in your packet are to be understood using their ordinary, everyday meaning.
>
> "[Juror]: So it's a legal term.
>
> "The Court: Is it a legal term having to do with this case?
>
> "[Juror]: Yeah.

"The Court: No, sir.

"[Juror]: Okay.

"The Court: And again, if it's not defined specifically in your packets, it is to be interpreted using their ordinary, everyday meaning. Okay?"

The court then took a short recess before reconvening for closing argument.

Before the jury retired for deliberations, the trial court instructed the jury, "If you need to communicate with me while you are deliberating, send a note through the bailiff, signed by the foreperson or by one or more members of the jury. . . . To have a complete record of this trial, it is important that you not communicate with me except by a written note. If you have questions, I will talk with the attorneys before I answer so it may take some time. . . . I will answer any questions in writing or orally here in open court." (See CALCRIM No. 3550.)

During deliberations, the jury submitted written questions to the court, none of which asked for clarification of legal terms.[9]

B. *Analysis*

Averhart contends the trial court's "refusal to answer" the jurors' questions violated section 1138 and deprived him of his due process right to a fair trial.

Averhart fails to cite any authority that requires a trial court, pursuant to section 1138, to respond to jury questions *before* the jury has retired for deliberations.

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9 The jury's written questions were: (1) "If we have come to an agreement on [two] counts but are split on one count does that create a hung jury on all [three] counts," (2) "Can we have a copy of [Averhart's] testimony," and (3) "We need to hear testimony from [Mauro] on the blue shirt."

Pursuant to section 1138, the trial court has a statutory duty to provide a *deliberating* jury with information on points of law arising in the case. (§ 1138 ["*After the jury have retired for deliberation*, . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given . . . ."], italics added.) As our Supreme Court noted in *People v. Boyette* (2002) 29 Cal.4th 381, 430, footnote 9 (*Boyette*), "[t]his section does not strictly apply here because the jury had not yet commenced its deliberations when the trial court received the juror note at issue."

Even assuming section 1138 applies where the jury's questions are posed prior to deliberations, Averhart forfeited his claim of error. Averhart's counsel did not object to the trial court's responses to either of the jurors' questions. (*Boyette*, *supra*, 29 Cal.4th at p. 430 [a claim that the trial court failed to respond adequately to a question from the jury must be raised at trial].) Trying to refute a finding of forfeiture, Averhart refers us to the following statements by defense counsel after the jury retired for deliberations: "I do want to address the [juror's] comment. I was hoping that the court was going to inform him that they had the opportunity to write questions, but it wasn't in the instructions." As the court immediately pointed out, however, it *did* provide the instruction counsel was "hoping" for. Apparently satisfied with the court's answer, defense counsel moved on to another subject. We reject Averhart's contention that these statements by counsel preserve his claim of error under section 1138.

Even if it had not been forfeited, Averhart's claim under section 1138 lacks merit.[10] When a juror interrupted the proceedings to ask about the crime of robbery before opening statements began, the trial court explained it would address this at the close of trial. The trial court's response was appropriate. (See § 1044 [trial court has considerable discretion to control the trial proceedings]; *People v. Tafoya* (2007) 42 Cal.4th 147, 168-169.) At the close of trial, the court did in fact instruct the jury regarding the elements of robbery and provide written packets of the instructions. Although the trial court must provide a deliberating jury with information "on any point of law arising in the case" (§ 1138), " '[w]here the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information.' " (*People v. Brooks* (2017) 3 Cal.5th 1, 97; accord, *People v. Beardslee* (1991) 53 Cal.3d 68, 97 (*Beardslee*).) Here, it is undisputed that the instructions on the elements of robbery were full and complete. The court therefore had discretion to determine whether to provide additional instructions and it did not err in its handling of the juror's initial question.

The court did not err on the second juror's question either. The trial court took appropriate steps when asked during closing arguments about an unspecified legal term.

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10 Because we conclude Averhart has not established error and any error was not prejudicial, we reject Averhart's claim that counsel provided ineffective assistance by failing to object. (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694 (*Strickland*) [counsel's assistance is ineffective if counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and counsel's deficient representation subjected defendant to prejudice].)

The court explained the procedures that would be followed, noting that the jury should refer to the instructions provided for relevant legal terms, and should give other terms their "ordinary, everyday meaning." This was a proper exercise of discretion. (*People v. Lua* (2017) 10 Cal.App.5th 1004, 1017 ["[T]he trial court does not abuse its discretion when it determines the best way to aid the jury is by directing the jury to reread the applicable jury instructions that 'are themselves full and complete.' "]; see CALCRIM No. 200 ["Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings."].)

Even if the trial court erred in its responses to the jurors' predeliberation questions, any error was harmless. "A violation of section 1138 does not warrant reversal unless prejudice is shown." (*Beardslee*, *supra*, 53 Cal.3d at p. 97.) Error due to the trial court's failure to adequately answer a jury's question is subject to the prejudice standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), such that reversal is only required where there is a reasonable probability the error resulted in a less favorable outcome. (*People v. Roberts* (1992) 2 Cal.4th 271, 326.) "In determining whether there was prejudice [under the *Watson* standard], the entire record should be examined, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130.)

Here, we conclude it is not reasonably probable any error resulted in a less favorable outcome. It is undisputed that the jury was properly instructed on the elements the People were required to prove to show Averhart committed robbery. Averhart points

to no instructional errors that a different response to the questions could have remedied. We reject Averhart's characterization of the trial court's actions as a "refusal" to answer the jury questions. The instructions clearly encouraged communications made in writing at the appropriate time. We presume the jury understood and followed the court's instructions. (See *People v. Martinez* (2010) 47 Cal.4th 911, 957 (*Martinez*).) Indeed, the three written notes the jury prepared during deliberations demonstrate the jury understood its ability to ask questions of the court as needed.

Because the trial court did not abuse its discretion in responding to the jury's questions, Averhart's claim that the court's response violated his due process rights also fails. (*Weeks v. Angelone* (2000) 528 U.S. 225, 234.) Averhart contends that the trial court's "refusal to address the juror's question about the robbery instruction probably lessened the burden of proof on the critical question of Averhart's intent." He further contends the court had a constitutional duty to resolve any instructional confusion expressed by the jury. We reject Averhart's argument that the alleged error amounts to federal constitutional error. It is well established that "every state law error does not automatically result in a violation of the federal Constitution . . . ." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 413, fn. 34.) As already discussed, the jury was fully instructed on all applicable legal principles prior to beginning deliberations, and while deliberating, submitted no further questions regarding the instructions. Averhart offers no basis for inferring that the jury misinterpreted the law or the instructions. We thus find no merit in Averhart's assertions of structural and constitutional error.

II

DNA Evidence

A. *Failure to Object to Adequacy of Chain of Custody for DNA Evidence*

Averhart contends counsel rendered ineffective assistance and prejudiced him by failing to object to the chain of custody for the DNA evidence.

1. *Additional Factual Background*

Several individuals testified about their efforts to collect and preserve the T-shirt collected at the scene of the crime, the BB gun collected the next day, and Averhart's reference sample.

Deputy Schaefer testified that he placed the T-shirt into evidence. After photographing the shirt at the crime scene, he placed it into a brown paper bag and transported it to the Vista sheriff's patrol station where he took additional photos then sealed the bag with tape. He wrote his name and the date that it was sealed. He booked the sealed package into evidence as item number 3.

Deputy Morgan testified that he impounded the BB gun into evidence when it was discovered by Thomas and Maria the day after the robberies. Wearing gloves, the deputy placed the gun into a brown paper bag and secured it while he returned to the Vista patrol station's evidence processing location. There, wearing gloves, he placed the gun into a sheriff's evidence gun box, secured it with tape, wrote his initials and ID number, and placed it into evidence as item number 10. He put a request into the sheriff's department's internal system to have the gun checked for prints and analyzed for DNA.

Detective Orsini testified regarding how he obtained a DNA sample from Averhart. Using gloved hands and a "DNA stain kit," he swabbed the inside of Averhart's mouth and cheek with two test swabs, capped each swab, placed them back into the DNA kit envelope, closed the envelope, and sealed it with tape. He initialed the sealed envelope and impounded the envelope into evidence as item number 14. He submitted a request to the San Diego County Sheriff's Department crime lab to DNA test the T-shirt and BB gun, cross-referenced with Averhart's DNA sample.

Chang, criminalist with the sheriff's crime lab since 2007, testified that she performed the DNA analysis requested in this case. At the crime lab, she obtains samples to test by checking evidence out of the lab's "property in evidence" unit. Evidence is regularly delivered to the unit from the various sheriff substations. When she obtains a sample from the unit, she is required to sign for it. Then she checks the sample's packaging to make sure it is properly sealed with initials and a date across the seal. She inspects for holes or flaws in the packaging.

In this case, Chang was provided with three samples; they were described in her lab report as "Item 3—Shirt (LAB ID 1)," "Item 10.01—Swab from the grip of the BB gun (LAB ID 3)," and "Item 14—Reference oral swabs from Trevell Averhart (LAB ID 2)."[11] There were no broken seals on any of the packages containing the samples she tested.

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11 Chang testified that she does not assign the item numbers; they come preassigned.

Chang's testimony emphasized that she did not test the gun itself, and she did not swab the gun. She testified, "So the item that I actually checked out from property in evidence is item 10.01, and it was a swab kit from the gun. So that's something that's generated from our latent print unit, someone in the latent print unit looks at the gun and they swab it for DNA, and then the swabs come to me."

When asked if she could "explain how the property goes from, say, the Vista Sheriff's Patrol Station to [her] crime lab," Chang responded, "I don't know if—if I could really explain it, other than saying they deliver the evidence to our property in evidence unit." She further testified that "they regularly make evidence runs."

2. *Analysis*

"In a chain of custody claim, ' "[t]he burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight." ' " (*People v. Catlin* (2001) 26 Cal.4th 81, 134 (*Catlin*); accord *People v. Lucas* (2014) 60 Cal.4th 153, 285 (*Lucas*) ["[T]he trial court decides the admissibility of physical evidence based on challenges to the chain of custody, and, once admitted, any

minor defects in the chain of custody go to its weight."], disapproved on another point by *People v. Romero & Self* (2015) 62 Cal.4th 1, 53, fn. 19.) "The trial court's exercise of discretion in admitting the evidence is reviewed on appeal for abuse of discretion." (*Catlin*, at p. 134.)

Averhart argues that an important link in the chain of custody for the DNA evidence was missing because nothing in the record demonstrates what happened to the BB gun after Deputy Morgan impounded it. He contends the chain of custody for his DNA reference sample is similarly deficient. More specifically, he claims the prosecution's evidence concerning the possession, transfer, or security of the samples is insufficient, creating an unreasonable gap in the custody chain. To support his claim, Averhart relies on *People v. Jimenez* (2008) 165 Cal.App.4th 75. In that case, the court found the chain of custody regarding the defendant's reference sample was "woefully inadequate" because it "amount[ed] to nothing more than a link here, a link there, with little more than speculation to connect the links into a chain," and "[s]erious questions arise about what, if anything, the reference sample ha[d] to do with [the defendant]." (*Id.* at p. 81.)

The court in *People v. Hall* (2010) 187 Cal.App.4th 282 (*Hall*) rejected a similar comparison to *Jimenez*. The court rejected defendant's challenge to the chain of custody of defendant's blood sample where the evidence—including evidence the criminalist received a sealed evidence envelope with a properly labeled blood sample—"strongly support[ed] a conclusion" that the blood sample drawn from the defendant was the one

which was "analyzed by the [testifying] criminalist." (*Hall*, at p. 295.)[12] The evidence here, like the evidence in *Hall*, strongly supports a conclusion that the samples analyzed by the criminalist were each derived from the evidence originally collected. Schaefer, Morgan, and Orsini testified that they impounded the shirt, BB gun, and reference samples, respectively, into evidence by packaging and sealing the items, and signing and dating the packages before booking them into evidence at the station. Deputy Morgan testified he entered a request into the sheriff's department's internal system to have the gun checked for prints and analyzed for DNA. Detective Orsini requested the crime lab to DNA test the shirt and gun, cross-referenced with Averhart's reference sample. Criminalist Chang testified how, in the ordinary course, she obtains samples, and explained the swab from the gun was something that would be collected in the latent print unit. She testified "they regularly make evidence runs" between the sheriff substations and the sheriff's crime lab where she performed her analysis. She further testified that, upon signing for these items and checking them for irregularities, she observed that none of the seals on these items was broken. The samples she obtained were a shirt labeled as "Item 3," a swab labeled as "10.01—Swab from the grip of the BB gun," and reference oral swabs labeled as "Item 14."

Averhart contends there was no evidence these items were maintained securely, but this contention is belied by Deputy Morgan's detailed testimony that he secured the gun in a sheriff's evidence gun box while impounding it into evidence at the "evidence

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12 In *Hall*, the blood sample was drawn by someone other than the criminalist who analyzed it. (*Hall, supra,* 187 Cal.App.4th at pp. 291-292.)

processing location" within the "Vista patrol station," as well as Chang's testimony that she was required to sign for the evidence samples. All the samples were sealed and signed by the collecting officers, and Chang testified that when she obtained the samples for testing, there were no broken seals on the packages.

Averhart argues that the failure to identify the individual who swabbed the BB gun after it was impounded into evidence demonstrates an unreasonable gap in the chain, but we disagree. Deputy Morgan testified that he impounded the gun into evidence in a sealed and secured sheriff's evidence gun box as item 10 in this case. He then put a request into the department's internal system to have the gun checked for prints and DNA. Criminalist Chang testified swabs from a gun would be collected in the latent print unit. Her report indicates that the gun swab was labeled as item 10.01, swab from the handle of BB gun. The swab sample was properly sealed when Chang obtained it by checking it out of the crime lab's "property in evidence" unit. Although it is unclear who swabbed the gun and "who labeled, sealed, and transported the evidence envelope, it is proper to presume that an official duty has been regularly performed unless there is some evidence to the contrary." (*Hall*, *supra*, 187 Cal.App.4th at p. 296.) There is no evidence here that the relevant official duties were not regularly performed. (*Ibid*.) Averhart's claim of alteration "is speculative at best." (*Id*. at p. 297.)

In sum, we conclude the trial court did not abuse its discretion in admitting the challenged DNA evidence. (*Catlin*, *supra*, 26 Cal.4th at p. 134.) Any claimed deficiency in the chain of custody goes to the weight of the evidence, not its admissibility. (*Ibid*.) Because we conclude the evidence was properly admitted, we reject Averhart's argument

that counsel's performance was deficient for failing to object.[13] (*Strickland*, *supra*, 466 U.S. at pp. 693-694.)

B. *Admissibility of the DNA Expert's Testimony and Report*

Averhart contends the trial court erred in allowing the DNA expert to testify as to how the BB gun was swabbed and in admitting the expert's own DNA laboratory report into evidence.

1. *Additional Factual Background*

After impounding the BB gun into evidence, Deputy Morgan requested it to be tested for prints and DNA. After impounding Averhart's DNA reference sample into evidence, Detective Orsini requested the shirt and gun to be DNA tested, cross-referenced with Averhart's DNA sample.

As discussed, Chang performed the DNA analysis of the shirt and gun obtained in evidence and compared them to the oral swab reference sample obtained from Averhart. Chang has been employed with the sheriff's crime lab since 2005 and had worked as a criminalist there since 2007. Her training as a criminalist includes her education—she has a Bachelor of Science degree in chemistry, a master's degree in forensic science, and participates in continuing education—as well as "in-house" training at the sheriff's crime lab, which took one and a half to two years to complete.

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13 Even if we were to assume arguendo that the court erred in admitting the DNA evidence and counsel's failure to object constituted deficient performance, we would conclude any error in admitting the DNA evidence was harmless under any standard in light of Averhart's own testimony, for the reasons discussed *post* in section II.B.2.

Chang obtains samples to test by checking evidence out of the crime lab's "property in evidence" unit. In this case, she obtained three, pre-labeled samples, identified with pre-assigned item numbers: a blue T-shirt, a swab kit collected from the BB gun, and a reference swab sample from Averhart. Chang observed no broken seals on any of the samples' packages.

Chang testified that she performed the comparative DNA test of the shirt using a DNA sample that she obtained herself, by swabbing the shirt's inner collar.

Chang testified that she did not obtain a DNA sample from the gun by swabbing it herself. Rather, she tested a swab kit previously obtained from the BB gun. Chang testified, "So the item that I actually checked out from property in evidence is item 10.01, and it was a swab kit from the gun. So that's something that's generated from our latent print unit, someone in the latent print unit looks at the gun and they swab it for DNA, and then the swabs come to me."[14]

On cross-examination, defense counsel emphasized that Chang did not herself swab the BB gun:

> "Q: . . . The gun swab that you received, you didn't actually do the swab yourself?
>
> "A: Correct. I might have said earlier swabs, but it was in fact one swab.
>
> "Q: You weren't present at the time the swab was taken?
>
> "A: No."

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[14] The trial court overruled defense counsel's "personal knowledge" objection to this testimony.

On redirect, the prosecutor questioned Chang regarding notes produced in connection with the DNA samples.

> "Q: . . . You referred to some notes that were produced in relation to the swabbing of the gun.
>
> "A: Yes.
>
> "Q: Are these notes created at or near the time that the swabbing is done?
>
> "A: Yes.
>
> "Q: Do you, as a DNA tester, rely on the notes for their reliability?
>
> "A: I'm sorry, I'm not sure. When you say for their reliability, I'm not sure what you're referring to, but I use—I incorporate those notes into my own notes.
>
> "Q: Okay. And so is the accuracy of those notes important for you to perform your job?
>
> "A: In terms of the DNA analysis, I wouldn't say so. If it's—the notes I'm referring to are telling me where the sample is from. So, you know, I can still do DNA analysis on the item regardless of where it's from or where they say it's from.
>
> "Q: It doesn't prevent you from ever conducting a test?
>
> "A: No.
>
> "Q: Does it assist in coming to an ultimate conclusion of the importance of the test, if that makes sense?
>
> "A: Well, the results that I obtain are the results that I obtain regardless of where the sample's from, if that make[s] sense. I mean, it's—the results are what's generated from the sample itself. I use the information from the notes—I mean, I put that in my report to say what the sample actually is sometimes."

After Chang performed the comparative DNA analysis of the shirt and gun with Averhart's reference sample, she recorded her results in a laboratory service report. The

report states that "DNA Analysis" service was requested by Deputy Orsini, and lists the San Diego County Sheriff's Department case number. The report describes the "evidence submitted" as "Item 3—Shirt (LAB ID 1)," "Item 10.01—Swab from the grip of the BB gun (LAB ID 3)," and "Item 14—Reference oral swabs from Trevell Averhart (LAB ID 2)." The report contains a written description of the DNA analysis results that Chang testified to and data describing the "reference DNA profile." The report is signed and dated by Chang (as "Analyst") as well as two other individuals, a "Technical Reviewer" and an "Administrative Reviewer." Chang testified she prepared the report in the ordinary course of business, soon after she had completed the DNA tests. She testified such reports are used in cases in connection with subsequent testimony and are relied on to be accurate. The trial court admitted the DNA analysis report into evidence, over defense counsel's hearsay objection.

2. *Analysis*

Defendant forfeited his confrontation clause challenge by failing to object on those grounds in the trial court. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1216-1217.) Even if the argument had been preserved, it lacks merit.

Citing *People v. Sanchez* (2016) 63 Cal.4th 665, Averhart contends the court erred in allowing the DNA expert to testify about case-specific facts—i.e., the fact that the gun was swabbed—about which she had no independent knowledge. In *Sánchez*, our Supreme Court explained that "[i]f an expert testifies to case-specific out-of-court statements to *explain the bases* for his opinion, those statements are necessarily considered by the jury *for their truth*, thus rendering them hearsay." (*Id*. at p. 684, italics

added.) The court held that an expert cannot "relate [to the jury] as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id*. at p. 686.) Nonetheless, "[a]ny expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so," without violating either hearsay rules or the confrontation clause. (*Id*. at p. 685.)

Here, Chang testified as to how she approached this particular analysis and explained the conclusions she personally reached in analyzing the particular samples, testifying to the contents of her own report. Her testimony regarding crime lab practices and procedures was within her personal knowledge as a criminalist with over a decade of experience at the sheriff's crime lab, including extensive in-house training. There was nothing objectionable about Chang's testimony that she did not swab the gun herself, but rather tested the swab kit which was prepared by someone in the latent print unit. Nonetheless, her testimony does appear to have conveyed a case-specific fact to the jury—that the gun found at the scene was swabbed by an unknown person who did not

testify—which was admitted for its truth.[15] (See *People v. Lopez* (2012) 55 Cal.4th 569, 583-584 (*Lopez*) [laboratory assistant's notations linking defendant's name to blood sample number assigned to defendant was hearsay admitted for its truth].)

Even if this testimony was hearsay, there is no confrontation clause violation unless it was *testimonial* hearsay. (*Lopez*, *supra*, 55 Cal.4th at p. 584 [after concluding notation linking defendant's name to blood sample was admitted for its truth, court emphasized "the critical question here is whether that notation is testimonial hearsay and hence could not be used by the prosecution at trial"].) "On appeal, we independently review whether a statement was testimonial so as to implicate the constitutional right of confrontation." (*People v. Nelson* (2010) 190 Cal.App.4th 1453, 1466.)

For a statement to be testimonial, the statement "must be made with some degree of formality . . . [and] only if its primary purpose pertains in some fashion to a criminal prosecution." (*People v. Dungo* (2012) 55 Cal.4th 608, 619; accord *Lopez*, *supra*, 55 Cal.4th at pp. 581-582; see *People v. Holmes* (2012) 212 Cal.App.4th 431, 438 ["It is

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[15] Although Chang did not have personal knowledge of where the sample was from, she explained that she incorporates notes telling her where the sample is from into her own notes. She did not rely on that information to form the basis for her opinion. Rather, she explained, "[T]he results that I obtain are the results that I obtain regardless of where the sample's from." As a whole, Chang's testimony did not purport to convey her personal knowledge about how the gun was swabbed. Chang's testimony is more accurately characterized as a general description of the crime lab procedures that would have occurred prior to her receiving a sample for analysis: "a swab kit from the gun . . . [is] something that's generated from our latent print unit, someone in the latent print unit looks at the gun and they swab it for DNA, and then the swabs come to me." Nonetheless, we assume without deciding that she conveyed case-specific hearsay (suggesting the gun found at the scene was swabbed), and proceed to the critical question of whether it was testimonial hearsay.

now settled in California that a statement is not testimonial unless both criteria are met."].) In *Lopez*, a criminalist testified his (nontestifying) colleague had analyzed a sample of the defendant's blood and determined his blood alcohol level was 0.09 percent. The testifying criminalist also reached the same conclusion "based on his own 'separate abilities as a criminal analyst.' " (*Lopez*, at p. 574.) The nontestifying analyst's report, which was comprised of chain of custody information, machine-generated data, and the analyst's notations linking a particular sample number to the defendant, was admitted into evidence. (*Id*. at pp. 582-584.) The court concluded the report was not sufficiently formal to constitute testimonial hearsay because the analyst's notations were "nothing more than an informal record of data for internal purposes." (*Id*. at p. 584, see *id*. at pp. 582-585.) In *Dungo*, the court similarly held that factual observations by a nontestifying pathologist, recorded in an unsworn autopsy report, were not testimonial because they lacked formality and criminal investigation was not the autopsy's sole purpose. (*Dungo*, at p. 619.) Similarly, here, the fact that the sample Chang tested was identified by someone else as coming "from the grip of the BB gun" does not violate Averhart's constitutional rights under the confrontation clause because this information lacks formality, was prepared for internal purposes, and does not constitute testimonial hearsay. (*Lopez*, at p. 585 [notation in nontestifying analyst's report linking defendant's name to numbered blood sample was "not testimonial in nature"]; *Holmes*, at p. 438 [rejecting argument that right to confrontation was infringed where DNA experts who testified did not personally perform all testing upon which they relied in reaching their opinions].)

The trial court also did not err in admitting Chang's report. (*Lopez*, *supra*, 55 Cal.4th at pp. 583-585 [laboratory blood alcohol report comprised of chain of custody information, data, and notations was not sufficiently formal to constitute testimonial hearsay].)[16] The fact that the report contains two other signatures (for a technical reviewer and administrative reviewer), does not alter our analysis. Neither of these reviewers made any out-of-court statements that were introduced at trial. (See *People v. Sanchez*, *supra*, 63 Cal.4th at p. 680 [first step in *Crawford* inquiry is whether statement offered is hearsay].) Here, the person who performed the DNA samples was present to testify about her work and subject to cross-examination. No violation of Averhart's right to confront witnesses occurred.

Even assuming there was error in permitting the criminalist to testify about the swabbing of the BB gun or admitting her report into evidence, any error was harmless beyond a reasonable doubt. (*People v. Rutterschmidt* (2012) 55 Cal.4th 650, 661 [any error in allowing lab director to testify about tests performed by others was harmless beyond a reasonable doubt in light of overwhelming evidence of guilt]; *Leon*, *supra*, 61 Cal.4th at p. 604 [error in admitting nontestifying witness's autopsy report was

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16 Averhart's reliance on *People v. Leon* (2015) 61 Cal.4th 569, 603-604 (*Leon*) is misplaced. The report here is not like the nontestifying witness's autopsy report read into evidence by an expert who did not prepare it in *Leon*. (See *People v. Barba* (2013) 215 Cal.App.4th 712, 742 ["So long as a qualified expert who is subject to cross-examination conveys an independent opinion about the test results, then evidence about the DNA tests themselves is admissible."]; *People v. Steppe* (2013) 213 Cal.App.4th 1116, 1118, 1122 [admission of a DNA analysis prepared by a person other than the testifying expert did not violate the defendant's right to confrontation; the reports on which the expert relied were not formalized statements and therefore were nontestimonial].)

harmless beyond a reasonable doubt]; *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

Averhart contends he was prejudiced because the DNA evidence "provided the necessary link between the BB gun and Averhart's commission of the robberies." But there was other compelling evidence linking Averhart to the BB gun, which in turn linked him to the robberies. Averhart himself admitted to owning a BB gun identical to the one found near the victims' stolen property. He also admitted owning the T-shirt which was tested for his DNA along with the gun. In light of Averhart's admissions to possessing these items at or near the crime scene at the time of the crime, any purported error in using the DNA testimony to link him to the gun was harmless. Moreover, aside from the DNA evidence, the testimony from three victims claiming Averhart robbed them, each of whom independently identified him as the robber at the scene, was overwhelming evidence of guilt.

III

Claims of Instructional Error

Averhart raises several claims of instructional error. The trial court has a duty to instruct on "principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty 'to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.' " (*People v. Saddler* (1979) 24 Cal.3d 671, 681.) When a defendant raises claims of instructional error, " 'we must first ascertain what the relevant law provides, and then determine what meaning the

instruction given conveys. The test is whether there is a reasonable likelihood that the jury understood the instruction in a manner that violated the defendant's rights.' [Citation.] We determine the correctness of the jury instructions from the entire charge of the court, not from considering only parts of an instruction or one particular instruction. [Citation.] The absence of an essential element from one instruction may be cured by another instruction or the instructions taken as a whole. [Citation.] Further, in examining the entire charge we assume that jurors are ' " ' "intelligent persons and capable of understanding and correlating all jury instructions which are given." ' " ' " (*People v. Smith* (2008) 168 Cal.App.4th 7, 13; accord *Martinez*, *supra*, 47 Cal.4th at p. 957.) The United States Supreme Court applies these same standards in reviewing claims that an instruction has violated a defendant's due process rights. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Smith*, at pp. 13-14.) Generally, claims of instructional error are reviewed de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.)

A. *Requested Instruction on Failing to Preserve Evidence*

Averhart argues that the trial court's refusal to provide a requested pinpoint instruction regarding the state's purported failure to preserve evidence amounted to error in violation of his constitutional rights.

1. *Additional Background*

Averhart elicited testimony at trial regarding the failure to collect evidence. Specifically: (1) Deputy Morgan did not collect the stolen property (the wallet and purse) or swab the property for fingerprints or DNA evidence; (2) Deputy Morgan did not collect the glasses that were found near the stolen property; (3) deputies did not collect

any DNA or fingerprint evidence from the victims' vehicles; and (4) no DNA or fingerprint samples were obtained from the victims.

Based on this perceived failure to collect evidence, Averhart requested the following instruction: "You have heard evidence that law enforcement failed to preserve and/or collect evidence for further testing. You must determine the weight to give this evidence. [¶] If you conclude law enforcement failed to preserve and/or collect a material piece of evidence, you may, but are not required, to conclude that the [P]eople have failed to meet their burden of proof."

The prosecutor objected, arguing that it was not a pattern jury instruction and not supported by case law. Defense counsel argued that the failure to collect the evidence "prevent[ed] the defense from assisting in the case." Counsel stated this was the defense's "linchpin argument," and described it as "similar" to *Trombetta* and *Youngblood*, but conceded there was no basis for an allegation of bad faith that would support a *Trombetta* motion.[17] The trial court declined to give the requested instruction but indicated defense counsel was free to argue that the failure to collect certain evidence raised reasonable doubt as to Averhart's guilt.

In closing arguments, defense counsel argued to the jury that the evidence that was not collected would have corroborated Averhart's version of events, but because it was not collected, he did not have the opportunity to test it.

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17 *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*); *Arizona v. Youngblood* (1988) 488 U.S. 51 (*Youngblood*).

2. *Analysis*

Averhart's theory of the defense was that "he was not the robber." He contends that a "key point in the defense case" was his claim that "material evidence was not preserved by law enforcement, thereby preventing the defense from testing it." Averhart acknowledges his counsel elicited testimony about "the state's failure to collect and test evidence," but contends "this cross-examination should have been bolstered by an instruction that advised the jurors how it could use that information." Without such an instruction, Averhart contends, his constitutional right to present a complete defense was violated.

"A criminal defendant is entitled, on request, to instructions that pinpoint the theory of the defense case." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142.) However, "a trial court may properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing." (*People v. Moon* (2005) 37 Cal.4th 1, 30.)[18]

Averhart cites cases authorizing adverse inference instructions based on the state's failure to preserve exculpatory evidence. But the requested instruction was not a correct statement of the law regarding the state's failure to preserve evidence based on the record

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18 Although the Supreme Court has not specifically announced what standard of review applies to the trial court's denial of a pinpoint instruction, we will review this instructional issue de novo consistent with the parties' positions on appeal. (Cf. *People v. Cook* (2006) 39 Cal.4th 566, 596 ["We independently review a trial court's failure to instruct on a lesser included offense."]; but see *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 497 [holding "the trial court did not *abuse its discretion* by denying the requested [pinpoint] instruction as duplicative," italics added].)

here. The state's affirmative duty to preserve evidence is limited to evidence that "might be expected to play a significant role in the suspect's defense." (*Trombetta*, *supra*, 467 U.S. at p. 488.) To meet this standard of "constitutional materiality," the evidence must possess "an exculpatory value that was apparent before the evidence was destroyed," and it must "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Id*. at p. 488.) However, a defendant's due process rights are not violated by the mere failure "to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Youngblood*, *supra*, 488 U.S. at p. 57.) "[I]f the best that can be said of the evidence is that it was 'potentially useful,' the defendant must also establish bad faith on the part of the police or the prosecution." (*People v. Alvarez* (2014) 229 Cal.App.4th 761, 773.)

Averhart has not established how the purported evidence here would be material or exculpatory, other than speculating it could have exonerated him or shown the "victims planted the evidence." Mere speculation about the exculpatory value of the evidence at issue is inadequate to establish a due process violation. (*People v. Alexander*

(2010) 49 Cal.4th 846, 878-879; *People v. Cook* (2007) 40 Cal.4th 1334, 1348-1351.)[19] Nor has Averhart demonstrated, or even alleged, that the officers or the prosecution acted in bad faith. Without a showing of bad faith to support a due process violation, the trial court was not required to give the requested jury instruction. (*Cooper*, *supra*, 53 Cal.3d at p. 811 ["Although an adverse instruction may be a proper response to a due process violation [citation], there was no such violation in this case. The trial court was not required to impose *any* sanction, including jury instructions."]; *People v. Farnam* (2002) 28 Cal.4th 107, 166-167 (*Farnam*) [where defendant failed to show bad faith in state's failure to preserve biological evidence, trial court did not err "in refusing defendant's instructional sanction"]; *People v. Roybal* (1998) 19 Cal.4th 481, 509, 511 [no error in failing to give instruction "to the effect that the police department's loss of the doorjamb made testing the print for blood impossible," on the ground that it was argumentative where evidence did not have apparent exculpatory value].)

Averhart argues *Trombetta* is distinguishable, and the Attorney General's reliance on the decision is misplaced, because Averhart is not asking to suppress evidence here. But the *Trombetta*/*Youngblood* framework applies when determining whether a cautionary instruction should be provided. (*Lucas, supra,* 60 Cal.4th at p. 222

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19 Averhart surmises the evidence "might have shown" someone else touched the stolen property or the vehicle, Averhart's fingerprints were not on the property or vehicle, or the victims' DNA or prints were on the BB gun. Averhart's claim that the evidence could have exonerated him is speculative given the other evidence that was collected and tested. (See *People v. Cooper* (1991) 53 Cal.3d 771, 811 (*Cooper*) [no *Trombetta* violation where "[a]dditional evidence would have been 'much more likely' to inculpate defendant than to exculpate him"].) At best, the evidence only had potential value to Averhart, requiring a showing that the police acted in bad faith in failing to preserve it.

["Although a jury instruction may be a viable response to a due process violation, the trial court is under no obligation to so instruct the jury when there is no violation."].) We reject Averhart's effort to invoke the due process principles underlying *Trombetta* while ignoring the governing framework for determining whether any type of sanction is required based on the state's failure to preserve evidence. (See *Cooper*, *supra*, 53 Cal.3d at p. 811 [in the absence of bad faith on the part of law enforcement in failing to preserve evidence, a trial court need not instruct the jury regarding inferences it may draw in defendant's favor].) Those same principles apply here, where Averhart requests an instruction telling the jury it "heard evidence that law enforcement failed to preserve and/or collect evidence" and it may "conclude that the [P]eople have failed to meet their burden of proof" based on that evidence. Whether a defendant seeks dismissal or, as here, a pinpoint instruction, the requested remedy is not warranted without a due process violation.[20]

Even if the trial court should have given the pinpoint instruction, any error was harmless. (*People v. Earp* (1999) 20 Cal.4th 826, 887 [applying *Watson* harmless error

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20 Averhart relies on *People v. Zamora* (1980) 28 Cal.3d 88, 102-103 and *People v. Wimberly* (1992) 5 Cal.App.4th 773, 791-793 to support his claim of error, but both cases involved adverse inference instructions where evidence was destroyed. There is no such destruction of evidence here. Averhart also contends it is clear there was error because the trial court itself "agreed the record clearly showed the evidence was not preserved, and 'it could raise some reasonable doubt in the mind of the jury.' " Averhart misconstrues the record. The trial court merely noted each side could argue the issue, and the jury would decide what to believe based on the evidence: "I'm not going to say some of you can't argue that point. I think it's raised by the evidence. But it might be enough to get you to that reasonable doubt type of scenario. I don't know. So again, it's up to those 14 people in the box." The trial court's remarks do not support Averhart's claim of error.

standard to refusal of pinpoint instruction].)[21] Defense counsel was able to cross-examine the deputies about their failure to collect evidence and counsel's closing arguments fully explained the defense theme that this failure created a reasonable doubt as to Averhart's guilt. Counsel's ability to "present evidence regarding deficiencies in the investigation to try to discredit the case against him" and to argue these points in closing was adequate to protect Averhart's right to a fair trial in this case. (*Cooper*, *supra*, 53 Cal.3d at pp. 811-812; *People v. Huston* (1989) 210 Cal.App.3d 192, 215 [finding no error in trial court's failure to give requested instruction as alternative to dismissal, for state's loss of documents; court additionally noted "there is no indication the defense was prevented from presenting to the jury evidence of the existence, confiscation and loss of documents"].) Any error in refusing to give the pinpoint instruction was harmless. (*Earp*, at pp. 886-887 [no prejudice from failure to give pinpoint instruction on third party culpability where jury was instructed prosecution had to prove guilt and defense counsel argued theory that someone else committed crimes].)

B. *Requested Flight Instruction*

Citing evidence that Averhart did not flee when he saw the police and was cooperative during the detention and witness identifications, Averhart contends the trial court abused its discretion in refusing to instruct the jury regarding the absence of flight.

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21 Averhart contends the purported error should be reviewed under the *Chapman* standard because it violated his federal constitutional right to present a complete defense. But Averhart's defense was fully presented and argued by counsel, and nothing in the instructions that were provided precluded him from arguing that he "was not the robber" or that the People's collection and preservation of evidence was so deficient it did not meet its burden of proof.

1. *Additional Background*

During the jury instructions conference, defense counsel requested that the trial court instruct the jury with the pattern instruction on flight, CALCRIM No. 372. This instruction provides: "If the defendant fled or tried to flee immediately after the crime was committed or after he was accused of committing the crime, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself." (CALCRIM No. 372.)

Defense counsel did not specifically request any modifications to CALCRIM No. 372, including language regarding the *absence of flight*. But the prosecutor referred to the concept of absence of flight in objecting to the proposed instruction. The prosecutor argued that, although a defendant's flight may show consciousness of guilt, the absence of flight does not show innocence because everyone is obligated to cooperate with and submit to police authority. The trial court denied Averhart's request to instruct the jury on flight.

Defense counsel focused on the concept of absence of flight in closing argument, arguing that Averhart's decision not to flee was evidence of his innocence. Counsel added, "There's a jury instruction on that. If you don't have it in paper, there's a . . . law that basically says if the defendant flees from the scene, you can view it as . . . ." The prosecutor objected, stating the court had already ruled on this. The court sustained the prosecutor's objection and instructed the jury to refer to the jury instructions they had been given for the applicable law. The court told defense counsel, "Please confine

yourself . . . to the law that the jury has been instructed on." Defense counsel protested, saying, "Is the court saying I can't argue the law, if it's an accurate recitation of the law?" The court responded that it would not permit counsel to "bring up additional law that they haven't heard." Counsel asked, "I can't argue an accurate representation of the law because it wasn't given in print?" The court replied, "It is my obligation to instruct the jury on the law that applies to this case. . . . It would be improper for you . . . to take over my specific judicial function and instruct them on law that they have not received." The trial court emphasized, "You can argue the law that they have been given, and you can argue how you feel that applies to the evidence." Defense counsel resumed her argument, telling the jury, "I won't tell you what the law is, but I'll tell you my argument. The fact that someone doesn't flee from the scene may show that they didn't flee because they . . . were not guilty. The fact that someone sticks around may be an indication that they do that because they're innocent."

2. *Analysis*

Averhart contends the court's refusal to instruct on the absence of flight amounted to a failure to instruct on his defense theory and violated his due process right to a fair trial. Averhart acknowledges that *People v. Staten* (2000) 24 Cal.4th 434, 459 (*Staten*) and *People v. Williams* (1997) 55 Cal.App.4th 648, 653 (*Williams*), hold that due process does not require instruction on the absence of flight. However, he argues that the court in *Williams* held the trial court retains discretionary authority to give such an instruction. In this case, Averhart contends the court should have exercised its discretion to instruct on the absence of flight because the instruction was supported by the evidence and relevant

to his defense that he did not flee because he did not rob anyone. We conclude the trial court did not abuse its discretion in refusing to instruct on the defendant's absence of flight.[22]

As Averhart concedes, our Supreme Court has rejected his claim that failing to instruct on the absence of flight violates a defendant's due process rights. In *People v. Green* (1980) 27 Cal.3d 1 (*Green*), abrogated on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 232-235, our Supreme Court rejected defendant's claim that the trial court erred in refusing to instruct on the absence of flight. (*Green*, at p. 36.) The court found that "the absence of flight is so ambiguous, so laden with conflicting interpretations, that its probative value on the issue of innocence is slight." (*Id*. at p. 39.) The court therefore concluded "that the trial court did not err in refusing to give the proffered instruction." (*Ibid*.) The Supreme Court reaffirmed this holding in *Staten*, stating: "We observed that such an instruction [on the absence of flight] would invite speculation; there are plausible reasons why a guilty person might refrain from flight. (*Green*, *supra*, 27 Cal.3d at pp. 37, 39.) Our conclusion therein also forecloses any federal or state constitutional challenge based on due process. (See also [*Williams*, *supra*,

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22 Although Averhart requested the pattern instruction on flight, both parties appear to agree the issue before this court is whether the trial court erred in failing to instruct on the *absence* of flight. We assume without deciding that the brief discussion regarding the absence of flight during the jury instructions conference was sufficient to preserve this argument. We further assume Averhart is not merely arguing that the pattern flight instruction should have been provided, because Averhart does not explain how that instruction would have benefited him or how he was prejudiced without it. (See *People v. Turner* (1990) 50 Cal.3d 668, 694 [a flight instruction "logically permits an inference that [defendant's] movement was motivated by guilty knowledge"].)

55 Cal.App.4th at pp. 652-653] [rejecting constitutional argument with regard to instruction on absence of flight].)" (*Staten*, *supra*, 24 Cal.4th at p. 459.)

Averhart relies on the holding in *Williams* that, although trial courts are not required to instruct on the absence of flight, they retain the discretion to do so. In *Williams*, the court explained that "the inference of consciousness of guilt from flight is one of the simplest, most compelling and universal in human experience. [Citation.] The absence of flight, on the other hand, is far less relevant, more inherently ambiguous and 'often feigned and artificial.' " (*Williams*, *supra*, 55 Cal.App.4th at p. 652.) The *Williams* court rejected the argument that due process required an instruction on the absence of flight, but noted, "we do not intend to proscribe the broad discretion of the trial court in giving an appropriate instruction on the absence of flight when supported by the evidence and of sufficient relevance in the context of the case." (*Ibid*.)

Notwithstanding the *Williams* court's statement that a trial court has discretion to instruct on the absence of flight when supported by the evidence, we follow our Supreme Court's holding in *Green* and *Staten* that refusal to give such an instruction is proper and does not violate due process. (*Green*, *supra*, 27 Cal.3d at p. 39; *Staten*, *supra*, 24 Cal.4th at p. 459; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity Sales*).)

We further conclude Averhart cannot show he was prejudiced by the trial court's refusal to give the requested instruction. Although Averhart did not flee when he encountered law enforcement and he was cooperative when detained for identification by the witnesses, there were clearly other plausible reasons for his failure to flee. (*Green*,

supra, 27 Cal.3d at p. 37.) Law enforcement quickly established a perimeter around the area; Averhart admitted he was unable to enter his girlfriend's apartment; and he was aware of law enforcement activity, including the police helicopter circling above. Averhart's failure to flee may have simply indicated he was unable to effectively escape the area. (*Williams*, *supra*, 55 Cal.App.4th at p. 651 ["Since it is reasonable to expect that all persons, whether guilty or innocent, will cooperate with a lawful police request, no compelling inference of innocence arises from such cooperation. It is also reasonable to conclude that appellant, despite his guilt, was literally fenced in and had little choice but to cooperate with the officer."].) On this record, "it is merely speculative that the jury would have reached a different verdict if it had been so instructed." (*Staten*, *supra*, 24 Cal.4th at p. 459.)

C. *Instruction Regarding a Witness's Level of Certainty*

Averhart argues the trial court erred in instructing the jury that an eyewitness's level of certainty can be considered when evaluating the reliability of the witness's identification of the defendant, because a body of research shows witness certainty has no correlation with accuracy. We conclude Averhart forfeited his claim of error, the claim fails on its merits, and the instruction was not prejudicial.

The trial court instructed the jury with CALCRIM No. 315, which identifies several factors the jury may consider in "decid[ing] whether an eyewitness gave truthful and accurate testimony" when identifying the defendant. Averhart challenges only one portion of the instruction, which allows the jury to consider the following: "How certain was the witness when he or she made an identification?" (CALCRIM No. 315.)

Averhart did not object to this instruction or request any modification to the witness certainty provision, and therefore forfeited the claim of error. (*People v. Sánchez* (2016) 63 Cal.4th 411, 461 (*Sánchez*).) "If defendant had wanted the court to modify the [certainty] instruction, he should have requested it. The trial court has no sua sponte duty to do so." (*Ibid*.)

Even if the argument had not been forfeited, we would reject it. Citing "[a] growing body of case law throughout the country,"[23] Averhart argues the challenged portion of CALCRIM No. 315 is erroneous because it "encourages erroneous and scientifically untenable jury findings." Our Supreme Court has already rejected this argument. In *Sánchez*, the court acknowledged that "some courts have disapproved instructing on the certainty factor in light of the scientific studies." (*Sánchez*, *supra*, 63 Cal.4th at p. 462.) Nonetheless, the court declined to reexamine its previous holdings approving of the instruction regarding the degree of an eyewitness's certainty. The court explained it had "specifically approved" CALCRIM No. 315's predecessor, CALJIC No. 2.92, "including its certainty factor" in *People v. Wright* (1988) 45 Cal.3d 1126, 1141 (*Wright*), and "reiterated the propriety of including this factor" in *People v. Johnson*

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23 Averhart cites *State v. Guilbert* (2012) 306 Conn. 218, 237, fn. 12; *State v. Clopten* (Utah 2009) 223 P.3d 1103, 1108; *United States v. Brownlee* (3rd Cir. 2006) 454 F.3d 131, 143-144; *Brodes v. State* (2005) 279 Ga. 435, 440; and *Commonwealth v. Santoli* (1997) 424 Mass. 837, 845-846. The courts in *Guilbert*, *Clopten*, and *Brownlee* dealt with the use of expert testimony regarding the reliability of eyewitness identifications. Although the courts in *Brodes* and *Santoli* disapproved of instructions including certainty as a factor in determining the reliability of an identification, we are not bound to follow out-of-state decisions. (*Gutierrez v. Superior Court* (1994) 24 Cal.App.4th 153, 170.)

(1992) 3 Cal.4th 1183, 1231-1232. (*Sánchez*, at p. 462.)[24] We are bound to follow the California Supreme Court's holdings (*Auto Equity Sales*, *supra*, 57 Cal.2d at p. 455), and therefore conclude there was no instructional error.

Even if the instruction on witness certainty was erroneous, Averhart has not demonstrated he was prejudiced by the instruction. (See *Sánchez*, *supra*, 63 Cal.4th at p. 463; *Wright*, *supra*, 45 Cal.3d at p. 1144 [analyzing instructional error under the *Watson* standard].) As in *Sánchez*, the challenged instruction here was presented in a neutral manner and did not equate the certainty of a witness's identification with its accuracy. (*Sánchez*, at p. 462.) The instruction did not tell the jury that eyewitness testimony is reliable or otherwise trustworthy, it did not advise the jury what weight to assign to the eyewitness's confidence, and witness certainty was only one factor among many that the jury was told to consider in evaluating an eyewitness identification. The instruction also does not reduce the prosecution's burden of proof—it instead reminds the jury the prosecution has the burden of proving its case beyond a reasonable doubt. (CALCRIM No. 315 ["The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty."].)

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24 The court further stated: "Any reexamination of our previous holdings in light of developments in other jurisdictions should await a case involving only certain identifications." (*Sánchez*, *supra*, 63 Cal.4th at p. 462; cf. *id*. at pp. 494-498 (conc. opn. of Liu, J.) [arguing instruction should be reexamined].) The court granted review in such a case, involving only certain identifications, in *People v. Lemcke* (June 21, 2018, G054241) [nonpub. opn.], review granted October 10, 2018, S250108.

We also consider the strength of the evidence in determining whether Averhart was prejudiced by the challenged instruction. Averhart was identified by three separate eyewitnesses who independently provided largely matching descriptions of the defendant to the police shortly after the robberies occurred. Averhart admitted to being involved in an altercation with Mauro, so this witness's identification was not even subject to any real dispute, and the robberies of the other two witnesses followed in close succession a short distance away. Averhart returned to the scene of the crimes after he was locked out of his girlfriend's apartment and the police established a perimeter impeding Averhart's ability to escape. Other evidence—including the T-shirt, the BB gun, and distinctive shoe prints—linked Averhart to the robberies. Under these circumstances, it is not reasonably probable Averhart would have obtained a more favorable result had the court omitted the instruction's language regarding the witnesses' certainty in identifying Averhart as the robber.

Having determined there was no error and no prejudice, we reject Averhart's contention that counsel rendered ineffective assistance by failing to object or request modification of the instruction. (*Strickland*, *supra*, 466 U.S. at pp. 687-688, 693-694; see

People v. Bradley (2012) 208 Cal.App.4th 64, 90 ["Failure to raise a meritless objection is not ineffective assistance of counsel"].)[25]

D. *Instruction Regarding Witness Credibility*

Averhart contends three additional factors relating to witnesses' truthfulness should have been included in the jury instruction regarding witness credibility and failure to include those factors constitutes prejudicial error. There was no instructional error.

1. *Additional Background*

The trial court instructed the jury regarding witness credibility with a slightly modified version of CALCRIM No. 226, as follows:

> "You alone, must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. You must judge the testimony of each witness by the same standards, setting aside any bias or prejudice you may have.
>
> "You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.
>
> "In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are:
>
> "How well could the witness see, hear, or otherwise perceive the things about which the witness testified?

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25 Averhart also contends that the error "was of federal constitutional dimension" because the instruction encouraged the jury to evaluate the evidence "in a manner that is scientifically unsound." Because Averhart forfeited the instructional error issue, and in any event there is no error under *Sánchez*, *supra*, 63 Cal.4th 411, it is unnecessary to consider his assertion that the claimed error violates the United States Constitution and is prejudicial under the standard in *Chapman*, *supra*, 386 U.S. 18.

"How well was the witness able to remember and describe what happened?

"What was the witness's behavior while testifying?

"Did the witness understand the questions and answer them directly?

"Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?

"What was the witness's attitude about the case or about testifying?

"Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?

"How reasonable is the testimony when you consider all the other evidence in the case?

"Did other evidence prove or disprove any fact about which the witness testified?

"Has the witness been convicted of a felony?

"Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently.

"If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject.

"If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest."

Defense counsel requested that the court include two additional factors, which are bracketed as optional in CALCRIM No. 226: "Did the witness admit to being

untruthful?" and "If the evidence establishes that a witness's character for truthfulness has not been discussed among the people who knew him or her, you may conclude from the lack of discussion that the witness's character for truthfulness is good."[26] Defense counsel did not request a third bracketed portion, but Averhart now contends it also should have been included: "What is the witness's character for truthfulness?" (CALCRIM No. 226.) The trial court did not instruct the jury with these three optional factors.

2. *Analysis*

Averhart contends there were sufficient inconsistencies in the accounts of Thomas and Mauro to justify giving the three additional factors. Although the trial court has a sua sponte duty to instruct on the principles embodied in CALCRIM No. 226, it may omit factors that are not applicable under the evidence. (*People v. Horning* (2004) 34 Cal.4th 871, 910 [analyzing CALCRIM No. 226's counterpart, CALJIC No. 2.20].) Indeed, "it is not error to fail to give *any* such instruction if the evidence does not warrant it." (*Horning*, at p. 908.)

Averhart claims that counsel "elicited false statements" made by Thomas and that Thomas "admitted he lied when he told the 911 operator and the deputy he saw Averhart beating up [Mauro]." These claims misconstrue the evidence. At best, counsel elicited inconsistencies in Thomas's recollection of events—which were largely immaterial—and

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[26] The bench notes accompanying CALCRIM No. 226 state in part, "Give all of the bracketed factors that are relevant based on the evidence."

Thomas did not admit to being untruthful.[27] We are not persuaded that, under the circumstances of this case, *inconsistencies* in witnesses' accounts justify an instruction regarding witnesses' *admissions to being untruthful.* Thus, there was no error in not providing the first requested instruction: "Did the witness admit to being untruthful?"

We similarly reject Averhart's contention that the two instructions regarding witnesses' character for truthfulness should have been given.[28] There was no evidence introduced to establish that Thomas or Mauro—the witnesses Averhart contends lied at trial—had a reputation for being untruthful.[29] (See *People v. Long* (2005) 126 Cal.App.4th 865, 871 [concluding no evidence of the witness's character for truthfulness was presented, and defining "character evidence" as " 'evidence regarding someone's general personality traits; evidence of a person's moral standing in a community based on reputation or opinion.' "].)

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27 Thomas acknowledged he did not personally see Averhart assaulting Mauro. He explained that his description to the police about the physical assault was based on what he inferred from seeing Averhart and Mauro together as Thomas drove by, hearing what sounded like an altercation, and being robbed himself by Averhart shortly thereafter.

28 We entertain Averhart's contention regarding all three omissions despite counsel's failure to request one of the provisions to determine whether Averhart's claim of instructional error implicates his substantial rights. (§ 1259.) " 'Substantial rights' are equated with errors resulting in a miscarriage of justice under [*Watson*, *supra*,] 46 Cal.2d 818." (*People v. Mitchell* (2008) 164 Cal.App.4th 442, 465.)

29 The only evidence remotely bearing on a witness's character for truthfulness was Deputy Schaefer's testimony that his partner, Ramirez, is honest. But *Ramirez's* honesty does not establish that *Mauro* and *Thomas* were untruthful. Averhart also cites no evidence that Mauro's and Thomas's character for truthfulness had "not been discussed among the people who knew" them. (CALCRIM No. 226.) Even if there were such a lack of discussion, that would operate to show these witnesses were truthful, not untruthful. (*People v. Jimenez* (2016) 246 Cal.App.4th 726, 735.)

Even if these three additional portions of CALCRIM No. 226 should have been provided, there was no prejudicial error. Averhart contends the error here amounts to federal constitutional error because it violated his fundamental right to present a complete defense. Averhart relies on *Mathews v. United States* (1988) 485 U.S. 58, where the Supreme Court concluded that failure to provide an entrapment instruction amounted to prejudicial error, and in so concluding, remarked, "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Id*. at p. 63.) Averhart's reliance on *Mathews* is misplaced. Omitting the three optional provisions of CALCRIM No. 226 did not preclude Averhart from presenting a defense. Averhart had a full opportunity to persuade the jury to reject the witnesses' versions of events and accept his version as accurate. We thus reject Averhart's argument that any error violated his constitutional rights. (*People v. Lawrence* (2009) 177 Cal.App.4th 547, 555 [rejecting claims of constitutional error and concluding CALCRIM No. 226 was properly given as it contains "no infirmity" in its wording].)

Averhart's claim of instructional error is properly analyzed under *Watson*. (See *Gonzalez, supra*, 5 Cal.5th at pp. 195-196; *People v. Murillo* (1996) 47 Cal.App.4th 1104, 1108 [applying *Watson* standard to trial court's error in failing to instruct the jury regarding the evaluation of a witness's willfully false testimony].) Averhart's claim fails because he has not demonstrated he was prejudiced. Averhart's counsel thoroughly cross-examined Thomas and Mauro regarding the purported inconsistencies in their testimony and counsel's closing argument highlighted these perceived inconsistencies. In

addition, the instructions that were provided properly guided the jury's evaluation of the witnesses' credibility and testimony. The jury was instructed that, "[i]n deciding whether testimony is true and accurate, use your common sense and experience. [¶] . . . [¶] In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony." The jury was told it should consider whether "the witness [made] a statement in the past that is consistent or inconsistent with his or her testimony," whether the testimony was reasonable when considered with all the other evidence in the case, and whether other evidence proved or disproved any fact about which the witness testified. The jury was further instructed it "should consider not believing anything [a] witness [who deliberately lied about something significant] says," and that it "must decide what evidence, if any, to believe" if the evidence is in conflict. Finally, the jury was instructed on how to treat statements that a witness made before the trial; it was instructed it could use the statements "(1) to evaluate whether the witness's testimony in court is believable; and (2) [a]s evidence that the information in those earlier statements is true." Taken as a whole, the record refutes Averhart's claim that the failure to include the three additional portions of the instruction regarding witness credibility would have improved his outcome at trial.[30] (*People v.*

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30 We likewise reject Averhart's alternative claim that counsel was ineffective for failing to request the instruction, "What is the witness's character for truthfulness?" Even if we assume that counsel's performance was deficient, it is not reasonably probable that, but for counsel's failure, the result of the trial would have been different. (*People v. Dickey* (2005) 35 Cal.4th 884, 907 [rejecting ineffective assistance of counsel argument where counsel failed to request a cautionary jury instruction related to reliability of

Anderson (2001) 25 Cal.4th 543, 583 [no prejudicial error in omitting reference to witness's character for truthfulness where "no evidence was presented that [the witnesses at issue] lacked the character traits of honesty or truthfulness" and "[o]ther issues related to the credibility of the testimony offered by [these witnesses] were amply covered by instructions the court did give"].)

E. *Failure to Request Additional Instruction on Witness Credibility of a Felon*

During his testimony, Averhart admitted he was previously convicted of two felonies, one in 2002 and one in 2006, and that he was not allowed to have a firearm in his possession as a convicted felon.[31] Averhart contends he was denied effective assistance of counsel because his attorney failed to request that the jury be instructed with CALCRIM No. 316, which limits the consideration of prior crimes evidence to the issue of credibility. Averhart argues that, because the jury was not told how to use his prior convictions, the jury likely used the convictions for an improper purpose—i.e., to conclude "he had a propensity to commit crimes and was therefore guilty."

CALCRIM No. 316 provides: "If you find that a witness has been convicted of a felony, you may consider that fact [only] in evaluating the credibility of the witness's testimony. The fact of a conviction does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes

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defendant's out-of-court statements].) In light of our conclusions, we do not address the Attorney General's argument regarding invited error.

31 It does not appear that any other information regarding his prior convictions was admitted into evidence. However, both parties made statements to the jury describing the felonies as crimes of moral turpitude.

the witness less believable." Although the trial court has no sua sponte duty to provide this limiting instruction, it must be given upon request. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052.)

To establish ineffective assistance of counsel, Averhart must show (1) his counsel's performance was deficient and (2) he suffered prejudice as a result. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; *Strickland*, *supra*, 466 U.S. at pp. 687-688.) Establishing prejudice requires showing "a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings." (*Cunningham*, at p. 1003; *Strickland*, at pp. 694-695.) "If the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal." (*People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069 (*Kraft*).)

Here, defense counsel may have had a tactical reason for not requesting a further instruction relating to his client's credibility. (See *People v. Maury* (2003) 30 Cal.4th 342, 394 [rejecting claim that counsel was incompetent for failing to request a limiting instruction because "[a] reasonable attorney may have tactically concluded that the risk of a limiting instruction . . . outweighed the questionable benefits such instruction would provide"].) Counsel may have determined that requesting CALCRIM No. 316 would unduly emphasize that a felony conviction could "destroy or impair [defendant's] credibility," even though such a conviction "does not necessarily" do so. (CALCRIM No. 316; see *People v. Hinton* (2006) 37 Cal.4th 839, 878 ["Defendant also complains

that counsel's failure to request a limiting instruction concerning his prior murder conviction demonstrated ineffective assistance, but counsel may have deemed it unwise to call further attention to it."].) Counsel instead chose to argue that Averhart's criminal convictions explained why he disposed of the gun at the pool and why he did not believe he could report his version of events to the police. Such tactical decisions are afforded substantial deference and rarely provide grounds for establishing counsel's incompetence. (*People v. Hayes* (1990) 52 Cal.3d 577, 621.) Because the record on appeal does not definitively demonstrate why counsel failed to request the instruction, and there were legitimate reasons for choosing not to make such a request, we reject Averhart's claim that his counsel provided ineffective assistance. (*Kraft*, *supra*, 23 Cal.4th at pp. 1068-1069.)

Even if we were to assume defense counsel's representation was deficient in not requesting a CALCRIM No. 316 instruction, Averhart was not prejudiced. We reject Averhart's claim that the jury would not know how to treat his prior felony convictions, and would therefore use them as propensity evidence to establish defendant's guilt. The jury was properly guided on how to assess a witness's credibility using CALCRIM No. 226. One of the factors the jury was informed it could consider was whether a witness has been convicted of a felony. The prosecutor reinforced this concept during closing arguments, telling the jury it could consider Averhart's felony convictions to evaluate his credibility. (See *Farnam*, *supra*, 28 Cal.4th at p. 151 [prosecutor's argument reinforced the "correct import" of instruction regarding prior convictions]; *People v. Young* (2005) 34 Cal.4th 1149, 1202 [appellate court "must consider the arguments of

counsel in assessing the probable impact of the instruction on the jury"].) The prosecutor never suggested the felony convictions could be used for any improper purpose. In addition, the evidence of Averhart's prior convictions was a very minor part of the case. Based on the record as a whole, there was very little risk, if any, that the jury would consider this evidence for improper propensity purposes. We therefore conclude it is not reasonably probable that Averhart would have obtained a more favorable result had CALCRIM No. 316 been given. (*Strickland*, *supra*, 466 U.S. at pp. 694-695.)

IV

Claims of Prosecutorial Misconduct

Averhart raises various claims of prosecutorial misconduct. A prosecutor has wide latitude to argue his or her case vigorously, but improper argument may amount to prejudicial misconduct if a prosecutor uses deceptive or reprehensible methods to persuade the jury or if the argument infects the trial with such unfairness as to make the conviction a denial of due process under the federal Constitution. (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*); *People v. Tully* (2012) 54 Cal.4th 952, 1009-1010.) A prosecutor need not act in bad faith to commit misconduct, but the defendant must have been prejudiced as a result. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214.)

To determine whether the alleged misconduct was sufficiently prejudicial as to require reversal, we consider "how the [statement] would, or could, have been understood by a reasonable juror" in the context of the entire argument. (*People v. Benson* (1990) 52 Cal.3d 754, 793 (*Benson*).) The court will not infer that the jury drew the most, as opposed to least, damaging meaning from the disputed comments; instead, the defendant

must establish a reasonable likelihood that the jury understood and applied the comments in an improper manner. (*People v. Frye* (1998) 18 Cal.4th 894, 970 (*Frye*), disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 420-421; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1403.)

The conduct is prejudicial under the federal Constitution when it infects the trial with such unfairness to deny the defendant due process and is prejudicial under state law, even if it does not result in a fundamentally unfair trial, if it employs deceptive or reprehensible methods to attempt to persuade the jury. (*People v. Powell* (2018) 6 Cal.5th 136, 172.) A finding of prejudice under either standard requires reversal. (*Ibid*.) If federal constitutional error is established, we apply the *Chapman* standard and decide whether the error is harmless beyond a reasonable doubt. (See *People v. Estrada* (1998) 63 Cal.App.4th 1090, 1106-1107, citing *Chapman*, 386 U.S. at p. 24.) If the error does not rise to that level, we apply the *Watson* standard and determine if there is a "reasonable probability that the jury would have reached a more favorable result absent the objectionable comments." (*People v. Sandoval* (1992) 4 Cal.4th 155, 184; *Watson, supra*, 46 Cal.2d at p. 836.)

A claim of prosecutorial misconduct is forfeited if the defendant fails to object and request an admonition to cure any harm. (*People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*).) "The defendant's failure to object will be excused if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct." (*Ibid*.)

A. Doyle *Error*[32]

1. *Additional Background*

On cross-examination, the prosecutor asked Averhart if he called the police to report he was the victim of a crime and if he told police his side of the story when he was initially detained. The prosecutor then asked Averhart about not reporting he was a victim of robbery when he was arrested, stating:

> "Q. Eventually you were arrested; correct?
>
> "A. Yes.
>
> [¶] . . . [¶]
>
> "Q. . . . You were told you were being arrested for robbery; correct?
>
> "A. Yes.
>
> "Q. And even then, you didn't bother to tell your side of the story that you're the victim in this case."

At this point the court sustained defense counsel's objection that the question was argumentative and instructed the prosecutor to rephrase the question.[33] The prosecutor asked the following question, without objection:

> "Q. After you were being told you were arrested for robbery, you never once said you were the victim in the case, did you?
>
> "A. I didn't know that I was being arrested for robbery until I got down to the station and I informed them that this was—excuse me —B.S."

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32 *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*).

33 The objection was phrased as "improper—argumentative."

Averhart then explained he was not read his *Miranda* rights until he arrived at the sheriff's station.[34]

> "Q. Mr. Averhart, you were placed into handcuffs; correct?
>
> "A. I was placed under arrest. They did not tell me what I was arrested for.
>
> "Q. Was part of being placed under arrest being placed in the handcuffs?
>
> "A. No, I didn't get read my *Miranda* rights until I got to the station."

The prosecutor did not ask any more questions regarding Averhart's statements to the police.

During closing argument, the prosecutor argued Averhart's testimony that he was the victim was not credible because he never reported the attack when the police detained him in the presence of his alleged attacker. As set forth below, there was one objection during this portion of the prosecutor's argument, based on the ground that the prosecutor misstated the evidence:

> "[Prosecutor]: . . . In the defendant's story, he is the victim . . . . The victim never called police. When the victim saw police, never reported to police what happened. When the police detained him in the presence of his attacker and the attacker is accusing him of being the person that robbed him—when the defendant saw all that, even then—even then he did not claim he was a victim.
>
> "[Defense counsel]: Objection. Misstates the evidence.
>
> "[The Court]: The objection is overruled. Once again, ladies and gentlemen, if either attorney misstates the evidence, you have been—you have been presented the evidence over the past number

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34 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

> of days. If either attorney misstates the law, you have the law right in front of you. Please continue, [prosecutor].
>
> [¶] . . . [¶]
>
> "[Prosecutor]: So you have to believe that, one, the victim—the victim never reported the crime. He had every opportunity to. He had every incentive to, once you're being detained and being accused of robbery, and he never mentioned a word. You have to believe that."

2. *Analysis*

"In *Doyle*, the United States Supreme Court held that it was a violation of due process and fundamental fairness to use a defendant's postarrest silence following *Miranda* warnings to impeach the defendant's trial testimony." (*People v. Collins* (2010) 49 Cal.4th 175, 203 (*Collins*).)

Averhart contends the prosecutor committed *Doyle* error by asking why Averhart did not tell the police his side of the story following his arrest,[35] and compounded the error by referring to Averhart's silence during closing argument. The Attorney General argues the claim of error was forfeited, and there was no *Doyle* error because the prosecutor only asked about Averhart's pre-*Miranda* silence. We agree with the Attorney General.

Averhart asserts "the prosecutor went too far when he asked Averhart why he did not tell his side of the story after he was arrested," and "[t]he court erroneously overruled defense counsel's objection the questioning was improper." As detailed *ante*, however,

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35 Although Averhart's opening brief contends "the prosecutor repeatedly asked Averhart why he did not tell the police his side of the story," he clarifies in his reply that his claim of error is limited to questions asked "after he was arrested."

defense counsel only objected that a question was argumentative and that the prosecutor misstated the evidence during closing argument. Averhart forfeited his claim of *Doyle* error by failing to object on such grounds at trial. (See *Collins*, *supra*, 49 Cal.4th at p. 198 [" ' "[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—*and on the same ground*—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." ' " (Italics added.)]; *People v. Tate* (2010) 49 Cal.4th 635, 691-692 [forfeiture rule applies to *Doyle* violation claims].)

Even if the claim had been preserved, there was no error. *Doyle* is implicated only after a defendant has been advised of his *Miranda* rights and has expressly invoked his right to remain silent. (*People v. Tom* (2014) 59 Cal.4th 1210, 1236 ["use of a defendant's postarrest, pre-*Miranda* silence is not barred by the Fifth Amendment in the absence of custodial interrogation or a clear invocation of the privilege" against self-incrimination].) The testimony set forth *ante* establishes that, when Averhart first encountered law enforcement, he stated he was going to his vehicle and made an apparent joke about fitting the suspect's description as a "Black male." Averhart claimed he did not report the incident to police during this encounter because he did not trust them. Averhart was arrested after the three witnesses identified him at the scene. He was not read his *Miranda* rights until he was at the station. It is clear from the record that the prosecutor was asking about Averhart's failure to provide his story (that he was the one robbed) during these periods *before* he was read his *Miranda* rights. Averhart's reliance on *People v. Evans* (1994) 25 Cal.App.4th 358 is therefore misplaced. (*Id*. at pp. 365,

368-369 [prosecutor specifically inquired as to why defendant did not give his side of the story to officers *after he received his* Miranda *warnings*].)[36]

To the extent any questions were improper, we conclude any error was harmless beyond a reasonable doubt. (*People v. Thomas* (2012) 54 Cal.4th 908, 936-937 [*Chapman* standard applies to *Doyle* error].) The jury was presented with Averhart's alternative explanation for not explaining his version of events when he encountered law enforcement. Even if this alternative had not been presented, the evidence of his guilt was compelling. Three witnesses independently identified Averhart as the robber; he admitted to being in the area at the time of the robberies and to engaging in an altercation with Mauro; he admitted to owning a BB gun identical to one used in the robberies; a BB gun identical to one used in the robberies was found near Thomas and Maria's discarded wallet and purse; he was linked to the crime through his shoes and shoeprints; and DNA matching Averhart's was obtained from the gun found with the discarded items and from Averhart's shirt found at the scene. We therefore conclude any error was harmless beyond a reasonable doubt. (*Chapman, supra*, 386 U.S. at p. 24; *People v. Hollinquest*

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36 We reject Averhart's attempt to establish a *Doyle* violation by relying on defendant's pretrial motion. The only evidence introduced at trial establishes the defendant was not read his *Miranda* rights until he was at the sheriff's station. Counsel's arguments in a pretrial pleading cannot be relied on to contradict that testimony. Even if we were to consider the pretrial motion, however, it would not support Averhart's claim of error because it does not establish *when* or *where* Averhart was read his *Miranda* rights.

(2010) 190 Cal.App.4th 1534, 1559-1560 [determining beyond a reasonable doubt any *Doyle* error did not contribute to the verdict].)[37]

B. *Reasonable Doubt Standard*

Averhart contends the prosecutor committed prosecutorial misconduct by (1) equating the reasonable doubt standard with decisions made in everyday life; (2) suggesting the jury could convict based on a "reasonable" account of the evidence; (3) suggesting defendant had a duty to produce evidence or prove his innocence; (4) telling the jury to base its decision only on the evidence presented; and (5) stating there is no time requirement associated with the reasonable doubt burden of proof. As a result of these remarks, Averhart contends, the prosecutor "improperly reduced" the reasonable doubt standard and shifted the burden of proof to him. We conclude Averhart forfeited this claim of error by failing to object at trial and there was no prejudicial prosecutorial misconduct even assuming the claim was preserved.

1. *Additional Background*

Before closing argument, the jury heard several instructions including one defining reasonable doubt (CALCRIM No. 220).

During closing argument, the prosecutor told the jurors they should ask whether Averhart's story leaves evidence unexplained or unaccounted for. The prosecutor said the victims' stories are "perfectly interlocking not only with each other but they are perfectly

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37 To the extent Averhart contends counsel was ineffective for failing to object on *Doyle* grounds, even assuming arguendo counsel's performance was deficient, we conclude that the lack of prejudice is fatal to Averhart's ineffective assistance of counsel claim. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 119.)

interlocking with the physical evidence that no one can dispute." By contrast, the prosecutor stated, "the defendant's story is unreasonable. It is not reasonable doubt." The prosecutor encouraged the jury to "consider the defendant's story." "But when you do it," the prosecutor stated, "ask yourself these questions: Are these true? . . . If you find even one of them is not true, they are all not true."

During rebuttal, the prosecutor asked the jury to consider "what's the reasonable story in this case, the three victims or the defendant[?]" With respect to Averhart's version, the prosecutor stated, "what we're being asked to do is just take the defendant's word for it. No one else can corroborate his theory. The evidence does not corroborate his theory. No reasonable interpretation of the evidence corroborates his theory. So we have to just take his word for it."

Also during rebuttal, the prosecutor stated, "Reasonable is not going to be defined. The phrase reasonable doubt is not going to be defined. Reasonable is how you use the term 'reasonable' in your everyday life. If someone tells you a story and you say, well, that's pretty reasonable. [¶] That seems reasonable that that could have happened—that's reasonable. If someone tells you a story, something just strikes you as that doesn't sound right; that doesn't add up; that sounds unreasonable—that's unreasonable. And it's not going to be defined any better than that. I apologize but that's the status of the law."

Additional statements forming the basis for Averhart's claim of prosecutorial misconduct are discussed *post*.

2. *Analysis*

Averhart forfeited his claim of error by not objecting or seeking an admonition "and no exception to the general rule requiring an objection and request for admonition applies." (*People v. Dalton* (2019) 7 Cal.5th 166, 253 (*Dalton*).) Even if his claim had been preserved, there was no prejudicial prosecutorial misconduct.

" '[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements.' " (*Hill, supra*, 17 Cal.4th at p. 829.) Averhart contends the prosecutor diluted the reasonable doubt standard by equating it to "something the jurors use in their 'everyday life.' " But it is clear from the entire context that the prosecutor was trying to explain the meaning of "reasonable." The prosecutor noted that "[r]easonable is not going to be defined" then noted this is a term used "in your everyday life."[38] The prosecutor emphasized the People's obligation to prove each element of the crime beyond a reasonable doubt. The jury was properly instructed on the reasonable doubt standard, and the prosecutor later brought the jury's attention to the reasonable doubt instruction they had received emphasizing "[i]f I've stated that incorrectly, just please follow the law." "In contrast to some other cases, the prosecutor here did not attempt to quantify reasonable doubt or analogize it to everyday decisions

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38 The prosecutor's statement was consistent with the jury instructions, that the undefined term reasonable is defined how the jurors use it in everyday life. (See CALCRIM No. 200.)

like whether to change lanes in traffic." (*People v. Bell* (2019) 7 Cal.5th 70, 111; see *People v. Nguyen* (1995) 40 Cal.App.4th 28, 35-36.)

Averhart relies on *Centeno, supra*, 60 Cal.4th 659 to support his claim that the prosecutor improperly suggested the jury could convict based on a "reasonable" account of the evidence. The case is inapposite because the prosecution here did not argue it met its burden of proof by providing a reasonable theory of the case. (*Centeno*, at p. 672 [prosecutor erred in suggesting that "a 'reasonable' account of the evidence *satisfies the prosecutor's burden of proof*"].) By noting that the victims' stories were "perfectly interlocking" with each other and the physical evidence while "the defendant's story is unreasonable," and asking "what's the reasonable story in this case, the three victims or the defendant," the prosecutor merely urged the jury to "reject impossible or unreasonable interpretations of the evidence," which "is permissible." (*Centeno*, at p. 672.)[39]

Next, Averhart argues it was error to suggest that he had a duty to produce evidence or prove his innocence. Averhart appears to object to the prosecutor's statements that "the defendant's story," matched against the evidence, "leave[s] some

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39 Moreover, as previously noted, the jury was properly instructed on the governing standard and the prosecutor repeatedly stressed it was the People's burden to prove each element of the charged crimes beyond a reasonable doubt. We presume the jury followed the court's instructions. (*Martinez, supra*, 47 Cal.4th at p. 957.)

things left to be explained," and "[t]he evidence does not corroborate his theory."[40] Based on our review of the record, we are not persuaded the jury was likely to have interpreted these statements in the manner urged on appeal. The prosecutor did not improperly suggest Averhart had a burden to produce evidence. The prosecutor's comments address Averhart's credibility and his believability in light of the evidence, and in light of his version's stark contrast with the testimony of three eyewitnesses. This was not improper. (*Centeno*, *supra*, 60 Cal.4th at p. 672.)

Averhart further contends the prosecutor misstated the burden of proof in arguing the jury must consider the evidence presented at trial. Averhart cites cases standing for the undisputed general principle that reasonable doubt may be based on the lack of evidence. Here, the prosecutor referred to language in the reasonable doubt instruction that the jury must "impartially compare and consider all the evidence that was received throughout the entire trial." (See CALCRIM No. 220.) The prosecutor further noted "you look at what was the evidence presented at trial. Is that enough to prove beyond a reasonable doubt? If I've stated that incorrectly, just please follow the law." These brief remarks would not reasonably be understood as lowering the burden of proof, particularly where the prosecutor immediately admonished the jury to consider the actual language in the instruction. Consistent with the court's instructions, the prosecutor's remarks merely

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40 Averhart's opening brief does not specify what remarks are objectionable on this ground. In his reply, Averhart cites 14 pages of the prosecutor's arguments, without specifying what statements are objectionable on this ground. Nonetheless, we have reviewed the entire record and considered all the referenced pages in evaluating Averhart's claim.

told the jury "that it must consider only the evidence presented at trial in determining whether the People have met their burden of proof," i.e., that "the People may not meet their burden of proof based on evidence other than that offered at trial." (*People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1509.)[41]

Finally, Averhart challenges the prosecutor's statement that there is no time requirement for the reasonable doubt standard. In closing argument, defense counsel stated: "*If 30 years from now, 50 years from now*, when you're sitting on your front porch with your grandkids or your great grandkids and you feel: I know I made the right decision. *There's no question in my mind* I made the right decision, and I still believe that way today, and if you believe that decision is guilt, then you have your burden." (Italics added.) In response, the prosecutor argued the reasonable doubt instruction does not include the words "no question," and there is no specified time period, stating: "You can look [at the instruction] as long as you'd like. You're not gonna see a time requirement. [¶] There is no requirement that when you're talking to your grandchildren—I mean, you're not even gonna remember the case. There's no time requirement for how long you think it's proof beyond a reasonable doubt."

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41 Averhart also objects to statements during voir dire. The prosecutor told the prospective jurors to "consider what evidence came before [them] in the trial" to determine if the case was proven beyond a reasonable doubt, and that they "just need to consider the evidence before [them] to make [their] ultimate conclusion." It is clear from the context of the four cited pages that the prosecutor's point was that the jurors should not speculate on evidence that was excluded or not presented by either side: "you're not allowed to speculate why that was allowed in or why it wasn't"; "you don't get to speculate on why something did or didn't happen." These statements during voir dire were not objectionable and were not likely to influence the jury's verdict in any event. (*People v. Seaton* (2001) 26 Cal.4th 598, 636.)

Citing caselaw describing an "abiding conviction" as a long-lasting belief (see *Hopt v. Utah* (1887) 120 U.S. 430, 439; *People v. Brigham* (1979) 25 Cal.3d 283, 290), Averhart contends these remarks were erroneous and improperly lessened the reasonable doubt standard. We disagree. Similar arguments were rejected in *People v. Potts* (2019) 6 Cal.5th 1012 (*Potts*) and *People v. Pierce* (2009) 172 Cal.App.4th 567. In *Potts*, our Supreme Court rejected a challenge to the following remarks: " 'But in your consideration of reasonable doubt don't ever come back and tell a prosecutor, "Gosh, you know, we believed he was guilty, but—." Don't do that. If you believe he's guilty today and you'll believe he's guilty next week then that's that abiding conviction that's going to stay with you.' " (*Potts*, at p. 1035, italics omitted.) The court reasoned that "[a] reasonable juror would interpret the argument as a whole as carrying the general import that an abiding conviction is one so strongly held that it lasts, rather than one that is fleeting and might weaken in the near future." (*Id*. at p. 1036.)[42] In *Pierce*, the prosecutor refuted defense counsel's explanation of an "abiding conviction" by telling the jury that the reasonable doubt instruction did not say " 'anything about tomorrow, the future, next week, or even ten minutes after your verdict . . . .' " (*Pierce*, at p. 570.) The prosecutor further told the jury that " 'when you're deliberating, when you've made your decision, that's when it counts.' " (*Id*. at p. 571.) The court rejected defendant's argument that the jury was "misled into thinking that the concept of 'an abiding conviction' did not

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42 The court also noted the prosecutor encouraged the jury to rely on the actual meaning of reasonable doubt, and the phrase was defined in the jury instructions. (*Potts*, *supra*, 6 Cal.5th at p. 1036.)

require a sense of 'permanen[ce]' of a juror's belief in the truth of the charge." (*Id*. at p. 571.)

Similarly, here, we conclude it is not reasonably likely jurors understood or applied the comments in an improper manner. The prosecutor's remarks were in direct response to defense counsel's statement that the standard would be met if there were "no question" in the jurors' minds regarding the defendant's guilt 30 to 50 years from now. The prosecutor merely pointed out the definition of reasonable doubt contains no such terms—the words "no question" are not part of the instruction and it does not include a specified time requirement. The prosecutor did not suggest a standard that would allow the jury to convict based on a conviction that was "fleeting and might weaken in the near future." (*Potts, supra,* 6 Cal.5th at p. 1036.)

In sum, we conclude the prosecutor did not commit misconduct when discussing the meaning of reasonable doubt. "Even assuming that the claim is preserved and that portions of the prosecutor's argument constituted misconduct, there is no reasonable probability that a result more favorable to [defendant] would have occurred absent the error." (*Dalton*, *supra*, 7 Cal.5th at p. 259, citing *Watson*, *supra*, 46 Cal.2d at p. 837.) The jury was properly instructed on the definition of reasonable doubt, it was told to follow the court's instructions rather than what the attorneys argued, and the court provided the written instructions to the jury to guide its deliberations.

C. *Memory Game*

Defense counsel sought to undermine the witnesses' testimony by pointing to inconsistencies and arguing " 'the truth is in the details.' " In response, the prosecutor

encouraged the jurors not to reject the witnesses' testimony because of minor inconsistencies in their version of events, and asked them to think back to the first day of voir dire to see if they could recall what he was wearing. The prosecutor said, "Think back. Can you remember? [¶] Play that game. And if you play that game in that jury deliberation room with 12 people, I can promise you you will have 12 different answers." The trial court overruled defense counsel's objection that this was improper argument. The prosecutor then continued, "You're going to have 12 different versions of the details. Okay? If the truth is in the details, if you're using the defense's argument, what you're saying is that you were not here for voir dire, and you cannot identify me as the person representing in the D.A.'s office."

Averhart contends the prosecutor violated his constitutional rights by telling jurors to "play a memory game." He contends the prosecutor improperly elicited "new evidence" from the jurors which they were not entitled to consider; the prosecutor was "vouching for his witnesses and providing expert testimony as an unsworn witness by suggesting he had some level of expertise on memory"; and the prosecutor encouraged the jury to apply a standard inconsistent with the reasonable doubt standard.

We reject Averhart's claims of misconduct. In the context of the entire argument, reasonable jurors would not have understood the prosecutor's remarks as encouraging them to perform experiments using new evidence not introduced at trial. (*Benson*, *supra*, 52 Cal.3d at p. 793.) Although the prosecutor referred to playing a "game" during jury deliberations, the context indicates the statement was phrased rhetorically in the context of asking what would happen if 12 people were asked to describe an event. The jury was

specifically instructed not to "conduct any tests or experiments" during its deliberations. We presume the jury followed this instruction. (*Martinez*, *supra*, 47 Cal.4th at p. 957.) The prosecutor was using a hypothetical scenario to illustrate that the jury should "not automatically reject testimony just because of inconsistencies or conflicts" and that "two people may witness the same event yet see or hear it differently." (CALCRIM No. 226.) "The use of hypotheticals is not forbidden and there is no misconduct when, as here, '[n]o reasonable juror would have misunderstood the expressly hypothetical examples to refer to evidence outside the record.' " (*People v. Mendoza* (2016) 62 Cal.4th 856, 907 (*Mendoza*).)

We similarly reject Averhart's contention that the prosecutor's comments amounted to improper vouching for the victim witnesses. "A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record." (*Frye*, *supra*, 18 Cal.4th at p. 971.) But it is not error for a prosecutor to give his opinion by reference to evidence introduced at trial. (*People v. Lopez* (2008) 42 Cal.4th 960, 971; *People v. Huggins* (2006) 38 Cal.4th 175, 206-207 [no misconduct based on prosecutor's remarks stating "Please believe me. [Defense counsel] has lied through his teeth in trying to sell this story to you," because "[i]t is not . . . misconduct to ask the jury to believe the prosecution's version of events as drawn from the evidence"].) The prosecutor here was

arguing reasonable inferences based on the evidence introduced at trial.[43] No reasonable juror would have concluded the prosecutor was purporting to be an expert in the field of memory by making these arguments.

Averhart's argument that the prosecutor asked the jury to apply a standard inconsistent with reasonable doubt also lacks merit. Averhart cites *Centeno*, *supra*, 60 Cal.4th at page 671, for the principle that "[i]t is wrong for the prosecutor to turn the 'deliberative process' into 'a game.' " We have already rejected Averhart's claim that the jury would have understood the prosecutor's remarks in this manner, and we further reject the claim that the prosecutor was attempting to lessen the People's burden of proof. The jury was properly instructed on the governing burden of proof, and the prosecutor reiterated the correct standard during closing arguments.

Nor has Averhart demonstrated any purported error was prejudicial. Prejudicial misconduct is established with evidence—not presented here—that jurors actually conducted tests or experiments during deliberations. (*People v. Wismer* (2017) 10 Cal.App.5th 1328, 1335-1337 [undisputed evidence established jury engaged in an experiment "creating new evidence for the jury to consider" in attempt to influence "holdout juror" whose vote changed after the experiment]; *Collins*, *supra*, 49 Cal.4th at

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43 Immediately after his statements regarding the hypothetical mental exercise, the prosecutor referred to one of the inconsistencies in the testimony—whether Thomas opened the car door during the robbery—and argued that this and other inconsistencies do not undercut the victims' stories. "[S]o long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' [the prosecutor's] comments cannot be characterized as improper vouching." (*Frye*, *supra*, 18 Cal.4th at p. 971.)

p. 249 [examining evidence of juror conduct to conclude there was no misconduct and no basis for finding of prejudicial error requiring new penalty phase trial].) No such evidence exists here. Even if the jurors were prompted to consider defects in memory during their deliberations as a result of the prosecutor's remarks, Averhart has not established that, in doing so, they relied on new or material evidence not presented at trial. (See *Collins*, at p. 249 ["Not every jury experiment constitutes misconduct. Improper experiments are those that allow the jury to discover *new* evidence by delving into areas not examined during trial."].) No presumption of prejudice arises on this record. (Cf. *Wismer*, at p. 1337.)

D. *Misstating the Evidence*

Averhart contends the prosecutor misstated the evidence and became an "unsworn witness" by telling the jury (1) "the defendant has testified he took a necklace from Mauro," when Averhart's actual testimony was that he "pulled as hard as [he could]" and Mauro's chain broke during their altercation; and (2) defendant "has two felony crimes of moral turpitude," when the evidence did not establish the felonies were crimes of moral turpitude.[44] It is misconduct for a prosecutor to assert facts that are not based on evidence. (*Hill*, *supra*, 17 Cal.4th at pp. 827-828.) The statement that Averhart took the necklace, however, was a fair inference based on defendant's testimony that he pulled the necklace from Mauro's chest during their altercation. Even if both comments were improper, they were not prejudicial. (*Watson*, *supra*, 46 Cal.2d at p. 836.) The two

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44 Defense counsel had previously referred to Averhart's felonies—felonies he admitted to upon taking the stand—as crimes of moral turpitude.

remarks were brief and the court instructed the jury that the sworn testimony of witnesses was evidence, but counsel's arguments were not. (See CALCRIM No. 222.)

E. *Vouching*

Averhart contends that, by repeatedly using the pronoun " 'we' " when summarizing the testimony of the People's witnesses, the prosecutor improperly vouched for the witnesses' veracity and placed "the prestige of the government behind the evidence." Specifically, the prosecutor asked "what do we know to be true" based on the evidence; summarized the evidence; and then made statements such as "we know this to be true" or "we know that to be true" based on that evidence. Even if the claimed error had not been forfeited (*Centeno, supra,* 60 Cal.4th at p. 674), there was no improper vouching in the prosecutor's recounting of the testimony. " 'Prosecutorial assurances, *based on the record,* regarding the apparent honesty or reliability of prosecution witnesses, cannot be characterized as improper "vouching," which usually involves an attempt to bolster a witness by reference to facts *outside* the record.' " (*People v. Williams* (1997) 16 Cal.4th 153, 257.) The prosecutor's comments, when considered in context, "would not be understood to refer to facts available solely to the government or to the prosecutor's personal knowledge or beliefs or the prestige of [the prosecutor's] office." (*Mendoza, supra,* 62 Cal.4th at p. 907; see *People v. Bonilla* (2007) 41 Cal.4th 313, 335-338 [prosecutor's statements regarding witness's truthfulness, including remarks about what "we know from everything we have heard," were not misconduct where they did not suggest the prosecutor had personal knowledge of facts outside the record].)

V

Cumulative Error

Averhart contends the cumulative prejudicial effect of the trial court's errors requires reversal of the judgment. We are not persuaded by Averhart's arguments, or that any assumed errors or misconduct had any prejudicial impact on the outcome of the case. We therefore conclude that the cumulative effect of any such errors also was not prejudicial. (See *In re Reno* (2012) 55 Cal.4th 428, 483; *People v. Martinez* (2003) 31 Cal.4th 673, 704.)[45]

VI

Remand for Resentencing Under Amended Sections 667 and 1385

Averhart contends his case should be remanded for resentencing pursuant to sections 667 and 1385, as amended by Senate Bill No. 1393, which, effective January 1, 2019, allows the trial court to exercise discretion to strike a formerly mandatory five-year enhancement applicable to defendants who have suffered a prior serious felony conviction. (Stats. 2018, ch. 1013, §§ 1-2.) Averhart contends, correctly, that the amendments apply because his conviction is not yet final. (*In re Estrada* (1965) 63 Cal.2d 740, 744; *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) We remand for resentencing but express no opinion as to how the trial court should exercise its discretion.

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45 Averhart also asserts his counsel provided ineffective assistance to the extent any of his claims were forfeited. As we have not resolved any of Averhart's claims solely on grounds of forfeiture, we need not further address Averhart's alternative ineffective assistance of counsel argument.

DISPOSITION

The sentence is vacated, and the matter is remanded to allow the trial court to exercise its discretion to determine whether to strike the two five-year enhancements under Penal Code sections 667, subdivision (a)(1) and 1385. In all other respects, the judgment is affirmed.

GUERRERO, J.

I CONCUR:

HUFFMAN, Acting P. J.

AARON, J.

I concur with the majority opinion with the exception of section III.C, pertaining to the trial court's instructing the jury with CALCRIM No. 315, which tells jurors that they may consider, among other factors, an eyewitness's level of certainty, in evaluating the reliability of the witness's identification of the defendant. I concur only in the result of that section.

Citing *People v. Sánchez* (2016) 63 Cal.4th 411, 462 (*Sánchez*), in which the Supreme Court noted that it had specifically approved CALJIC No. 2.92, the predecessor to CALCRIM No. 315, in *People v. Wright* (1988) 45 Cal.3d 1126 (*Wright*) and in *People v. Johnson* (1992) 3 Cal.4th 1183, " 'including its certainty factor,' " the majority states simply, "We are bound to follow the California Supreme Court's holdings . . . and therefore conclude that there was no instructional error." (Maj. Opn., *ante*, at pp. 51–52, citing *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) However, the *Sánchez* court did not unequivocally endorse CALCRIM No. 315 as a proper instruction in all cases. In fact, the *Sánchez* court suggested that a " 'reexamination of our previous holdings in light of developments in other jurisdictions,' " might be appropriate. In that regard, as the majority notes, the Supreme Court has granted review in *People v. Lemcke* (June 21, 2018, G054241) [nonpub. opn.], review granted October 10, 2018, S250108, which raises the following issue: "Does instructing a jury with CALCRIM No. 315 that an eyewitness's level of certainty can be considered when evaluating the reliability of the identification violate a defendant's due process rights?" In view of the tepid endorsement

of CALCRIM No. 315 in *Sánchez,* and the fact that the very issue that Averhart raises is under review in the Supreme Court, I believe that it is appropriate to discuss the merits of the issue.

The *Sánchez* court's reliance on *Wright* to uphold the propriety of instructing a jury that, in evaluating the reliability of an eyewitness's identification, they may consider the witness's level of certainty is, in my view, misplaced. In *Wright*, the court's focus was the propriety of giving such an instruction when *requested by the defendant*, and where that instruction " ' "directs attention to evidence from . . . which a reasonable doubt of guilt could be engendered." ' " (*Wright, supra*, 45 Cal.3d. at p. 1140.) In this vein, the *Wright* court noted that there exists " 'an unbroken string of authorities [that] requires the giving of factually appropriate pinpoint jury instructions correlating the issues of identity and reasonable doubt.' " (*Ibid.*) Thus, the *Wright* court was addressing a situation that is clearly distinguishable from that in the present case. Unlike in this case, the *Wright* court had no occasion to consider a defendant's claim that a jury instruction was improper because it implied that a witness's certainty increased the witness's believability.

Significantly, in *Wright*, the court cautioned that an instruction concerning eyewitness identification factors should list, *in a neutral manner*, the relevant factors supported by the evidence and "should *not* take a position as to the *impact* of each of the psychological factors listed." (*Wright, supra*, 45 Cal.3d at p. 1141.) The court further cautioned that such an instruction should not "improperly invad[e] the domain of either jury or expert witness." (*Id.* at p. 1143.)

Putting aside the obvious distinction between concluding that it is error to refuse to give a jury instruction requested by the defendant that deals with identification in the context of reasonable doubt, and concluding that it is not error to give an instruction on eyewitness identification to which the defendant has raised an objection, CALCRIM No. 315, as currently worded, fails to meet the standards set forth in *Wright* in that it *does* take a position as to the impact of the certainty of the eyewitness by implying that the more certain the eyewitness is of his identification, the more reliable the witness's identification.[1]

Research concerning the effect of certainty on the reliability of eyewitness identifications is, as Justice Liu noted in his concurring opinion in *Sánchez*, decidedly mixed. The giving of CALCRIM No. 315 in this case was problematic in that it, in effect, took sides in the debate, instructing jurors that, in fact, the more certain an eyewitness is of his identification, the more reliable his identification is.

While I do not believe that giving this instruction caused prejudicial error in this case in view of the strength of the evidence implicating appellant, it clearly could do so in other cases. Accordingly, I concur only in the result of section III.C of the majority

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1 The failure of the instruction to meet the *Wright* standards would be particularly glaring where the instruction is given in a case in which the defendant has presented expert testimony to the effect that an eyewitness's level of certainty is *unrelated to* the reliability of the witness's identification. In such a case, the instruction would entirely undermine the testimony of the defense expert without the prosecution having to present its own expert testimony to contradict that of the defendant's expert—if such an expert could be found, and would thus run afoul of the *Wright* court's admonition that such an instruction should not "improperly invad[e] the domain of either jury or expert witness." (*Wright, supra*, 45 Cal.3d at p. 1143.)

opinion. I would respectfully suggest that, in its consideration of the issue raised by the appellant in *Lemcke,* the Supreme Court reconsider whether the giving of CALCRIM No. 315 comports with the principles underlying the holding in *Wright.*

AARON, J.